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In the Supreme Court of the United States

OCTOBER TERM, 1994

DALE LYNN RYAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a permanently closed building at which, at the time of the alleged arson (and for weeks before), no business activity was being conducted, and which was not on the market for sale or rental, was nevertheless "used * * * in any activity affecting interstate * * * commerce," within the meaning of 18 U.S.C. 844(i), because it was "potentially marketable," received natural gas from out of state, and was owned by an out-of-state resident and leased by him to an out-of-state shell corporation.

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PETITION FOR A WRIT OF CERTIORARI

Dale Lynn Ryan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-17a) will be reported at 41 F.3d 361. The opinion of the panel of the court of appeals (App., *infra*, 19a-50a) is reported at 9 F.3d 660.

JURISDICTION

The en banc court of appeals entered its judgment on October 31, 1994. App., *infra*, 1a. A petition for a writ of certiorari is due on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 844(i) of Title 18 provides, in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; * * * and if death results to any person, * * * shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment * * *.

STATEMENT

Petitioner Dale Lynn Ryan was indicted on one count of destroying by means of fire a building "used in * * * any activity affecting interstate * * * commerce," in violation of 18 U.S.C. 844(i). The evidence at trial established that at the time of the fire, and for nearly a month beforehand, the building — a previously functioning fitness center — had been permanently closed; was performing no business functions; and was not on the market for sale, rental, or other disposition. In light of those evidentiary constraints, the government sought some other legal basis for claiming that the fitness center was "used" in an "activity" affecting interstate commerce at the time of the fire. At the government's request, the trial court instructed the jury that it could find that the building was "used in an activity affecting interstate commerce" if it found that the building *either* (i) was owned by an out-of-state resident and leased by him to an out-of-state corporation, *or* (ii) was supplied by natural gas from outside the state. Petitioner was convicted and sentenced to a term of imprisonment for 328 months. The court of appeals — recognizing the substantial importance (and dramatic consequences) of the instructions — reheard the case en banc, and, dividing 6-5, affirmed the conviction.

1. During the evening of January 1, 1990, a fire destroyed a fitness center in West Burlington, Iowa that had permanently closed because of low membership. App., *infra*, 47a. Petitioner

Dale Ryan had managed the fitness center, which his father (a resident of Kansas) owned. *Id.* at 20a. Tragically, two volunteer firemen died while attempting to extinguish the fire. Their deaths apparently occurred from oxygen deprivation after they left their hose and became lost in the building. III Tr. 30-33, 97-106, 189-192; IV Tr. 126. Although the building was permanently closed, it still received natural gas from an out-of-state source. III Tr. 107.

State and local law enforcement officials immediately investigated the cause of the fire. The fire marshal took 26 samples from the burn patterns to test for the presence of accelerants. App., *infra*, 22a. None of the samples, however, indicated that accelerants had been used. *Ibid.* Presumably because of the absence of sufficient evidence linking petitioner to the fire, state and local authorities declined to bring charges.

2. Eighteen months after the fire, a federal grand jury returned a one-count indictment charging petitioner with violating the federal anti-arson law, 18 U.S.C. 844(i). Section 844(i) prohibits the destruction by fire of any building "used * * * in any activity affecting interstate * * * commerce."

The evidence at trial showed that the fitness center had been closed on December 6, and from that date through the date of the fire conducted no further business. VI Tr. 147, 172. What is more, the building was never put on the market for sale or rental. Although one realtor testified that petitioner had taken her on a tour of the facility some two weeks before the fire, she explained that she never listed the property. Id. at 62-63, 65. A second realtor testified that she had placed repeated calls to petitioner to obtain a listing for the property, but that petitioner had failed to return the calls. VII Tr. 6-9, 12-15. Indeed, the government emphasized that petitioner's *failure* to market the property was circumstantial proof that he intended to burn it. As the prosecutor put it in summation, petitioner did not attempt to sell the building "because he knows what he's going to do with that club, and it's not sell it." XV Tr. 32.

In light of that record, the government sought, and the trial court gave, an instruction that told the jury that it could find that the building was "used in an activity affecting interstate commerce"

if it found beyond a reasonable doubt *either* that "the [fitness center] was owned by Ronald D. Ryan, a resident of Kansas, and leased by him to Ryan Air Services, Inc., a Kansas Corporation," or that "the [fitness center] was supplied with natural gas used to heat the building, and such natural gas was supplied from outside of the state of Iowa." App., *infra*, 27a. The government also relied on those theories in its summation as the sole basis for conviction on the commerce element of the offense. XV Tr. 10-11. Inexplicably, petitioner's trial counsel did not object to those instructions. App., *infra*, 3a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 19a-50a. The majority upheld both of the district court's alternative definitions of "used in an activity affecting interstate commerce." It opined that the out-of-state ownership of the fitness center was sufficient to meet the statutory requirement, and that "the receipt and use of natural gas from across state borders is an activity directly affecting interstate commerce." *Id.* at 28a.

Chief Judge Arnold concurred in part and dissented in part. App., *infra*, 43a-48a. He noted that Section 844(i) "only applies to property that is '*used*' in an '*activity*' that affects interstate commerce" (*id.* at 46a); accordingly, the "proper inquiry is into the function of the building itself, and then [into] a determination of whether that function affects interstate commerce" (*id.* at 47a). Because the fitness center was "closed permanently" (*ibid.*), Chief Judge Arnold concluded that "mere receipt of natural gas or out-of-state ownership, without any additional showing as to the use of the structure itself," could not satisfy "the activity requirement" of Section 844(i). *Id.* at 46a. The Chief Judge also noted that the panel's expansive interpretation of Section 844(i) conflicted with decisions of the Second and Tenth Circuits and "disturbs the balance between the state and federal governments" by federalizing virtually all arsons — a traditional common-law state crime. *Id.* at 47a-48a & n.3.

4. On January 5, 1994, the Eighth Circuit vacated the panel opinion and granted rehearing en banc. App., *infra*, 18a. The court thereafter affirmed by a vote of 6-5. *Id.* at 1a-17a.

The majority first held that the fitness center was "used in an activity affecting interstate commerce" and was thus covered by

Section 844(i). It explained that "[t]here is manifold evidence that the Fitness Center was about to be placed on the market for sale." App., *infra*, 7a. In particular, it cited evidence of efforts to clean the facility and remove personal property from the premises -- all of which, in the court's view, "indicate[d] the marketable nature of the property and its potential for ready reentrance as a functioning business in the commercial marketplace." *Ibid.* Apart from the "potential[ly]" "marketable nature of the property," the court also pointed to the "continued receipt of natural gas" at the fitness center, together with the fact that the building was owned by petitioner's father, an out-of-state resident, and was leased by him to an out-of-state shell corporation. *Ibid.*

Having concluded that the fitness center fit within the ambit of Section 844(i), the majority next turned to whether the jury instructions on the commerce element were plainly erroneous and concluded they were not. App., *infra*, 8a-11a. With respect to the trial court's first definition, the majority acknowledged that the Eighth Circuit had "never held out-of-state ownership sufficient on its own terms to satisfy the elements of section 844(i)." *Id.* at 10a. The majority added, however, that "that status, coupled with the lease arrangement, is not a plainly inaccurate showing of sufficient ties to interstate commerce." *Ibid.*[1]

The majority also declined to reverse on the "natural gas" instruction. It acknowledged that, in the prior decision in *United States* v. *Hansen*, 755 F.2d 629 (8th Cir.), cert. denied, 474 U.S. 834 (1985), the court had "indicated that reliance on the use of electricity 'would seem to stretch the notion of interstate commerce beyond the limits of logic.'" App., *infra*, 10a. The majority noted, however, that *Hansen* was decided before this Court's decision in *Russell* v. *United States*, 471 U.S. 858 (1985) — which, in the majority's view, approved a "sweeping jurisdictional scope" for Section 844(i). App., *infra*, 10a. Accordingly, the majority

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[1] In particular, the majority explained, "[t]he Ryan lease, although transacted through a corporate shell, indicates the marketable nature of the property." The court added that petitioner's father "manifested his ownership status through the exercise of direct, final control over the property in a necessarily interstate manner." App., *infra*, 10a.

concluded, in view of the unsettled state of the law, petitioner had "failed to meet his burden of proving clear error under our applicable circuit case law regarding the application of section 844(i)" (*id.* at 11a).[2]

Chief Judge Arnold — joined by Judges McMillian, Gibson, and Magill — concurred in the judgment in part and dissented in part, finding both alternative instructions on interstate commerce plainly erroneous. App., *infra*, 12a-17a.[3] The Chief Judge noted that Section 844(i) requires the government to show that the building was "used" in an "activity" affecting interstate commerce. But merely "[b]eing owned," he explained, is not an "activity." *Id.* at 15a. After all, the Chief Judge observed, "[e]very building is owned by someone" (*ibid.*). In this case, he noted, the fitness center was not being "used" in any "activity" at all at the time of the fire; it was simply "cumbering the ground." *Id.* at 16a. Moreover, Chief Judge Arnold explained, the receipt of natural gas likewise is not an "activity." *Ibid.* The Chief Judge also concluded that the instructional error affected substantial rights. In particular, he noted, the error implicated "an essential element of the crime." *Ibid.* Moreover, he explained, "[h]ad the jury been properly instructed in this case, it could have reached a different conclusion." *Ibid.*

REASONS FOR GRANTING THE PETITION

There are two distinct holdings in the court of appeals' decision in this case. *First*, the court held, by a closely divided vote, that the fitness center — despite being permanently closed, out of business, and off the market — was nevertheless "used in an activity affecting interstate commerce" at the time of the fire. *Second*, having decided that the evidence strongly showed that the

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[2] In all other respects, the court reinstated the panel's opinion. App., *infra*, 1a, 12a. Judge Morris Arnold concurred in the judgment, stating that, in his view, the instructions on the commerce element did not constitute plain error. *Id.* at 12a-13a.

[3] Judge Loken also dissented in part. In his view, the natural gas instruction was erroneous and affected petitioner's substantial rights. App., *infra*, 17a.

building was within the ambit of Section 844(i), as it construed the statute — and thus that valid jury instructions on the commerce element *could* have been given — the court held that the trial court's actual instructions on the commerce element were not plainly erroneous.

In short, the court of appeals' plain error analysis hinged critically on the logically prior holding that the fitness center fit within the ambit of Section 844(i). That is, had the court concluded — as the dissenters did — that the evidence of the interstate use element was weak or nonexistent, it likely would have reached a different result. Only after satisfying itself that there was a sufficient basis for Section 844(i) coverage did the court conclude that the actual instructions, even if containing erroneous elements, were not plainly erroneous. But that threshold decision was fundamentally wrong: the Ryan Fitness Center was simply not "used in an activity affecting interstate commerce"; the court of appeals' contrary conclusion misconstrues the plain language of the statute, is in conflict with decisions in two other Circuits, and presents a recurring and important question of federal statutory law. Further review is warranted.

A. The Court Of Appeals' Reliance On Receipt Of Natural Gas Is In Conflict With Decisions Of The Second And Tenth Circuits

The court of appeals rested its conclusion that the building containing the former fitness center came within the ambit of Section 844(i) in part on the ground that it received natural gas from out of state at the time of the fire. Although that extraordinarily broad view of the statute has been approved by the Seventh and Fourth Circuits, it has been explicitly disapproved by the Second Circuit, essentially rejected by the Tenth Circuit, and implicitly rejected by this Court in *Russell* v. *United States*, 471 U.S. 858 (1985). This case provides an appropriate vehicle for resolving that conflict and for rejecting the government's long-held (but erroneous) view that the receipt of interstate utilities constitutes "use[] * * * in an[] activity affecting interstate * * * commerce" under Section 844(i).

1. In *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), the Second Circuit upheld the dismissal of a Section 844(i)

indictment on the ground that the buildings at issue — two private dwellings — were not "used" in an "activity" affecting interstate commerce. Writing for the court, Judge Friendly noted that Section 844(i) covered buildings that housed companies whose business affected interstate commerce, and he emphasized that the "property must itself have been used in commerce." *Id.* at 110. "The critical word here is 'used.'" *Ibid.* Thus, the fact that the private homes at issue contained materials that were produced out-of-state was irrelevant for determining whether the home itself was "used" in an "activity" affecting interstate commerce (*ibid.*):

> a residence is not used in interstate or foreign commerce simply because it was built in part with out-of-state materials, its purchase was financed by a bank which engages in or whose activities affect interstate commerce, it was insured by a company engaged in such commerce, *[or] it received electric power and telephone service from companies engaged in or affecting commerce* * * *. It would be altogether strained to say that such a dwelling, although not used in commerce, is "used" in an activity affecting commerce. (Emphasis added.)

The Tenth Circuit took the same view in *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979), reversing a Section 844(i) conviction for conspiracy to assassinate a judge by destroying his pickup truck with explosives. The court concluded that the judge's truck was not "used" in an activity affecting interstate commerce, notwithstanding the fact that the vehicle traveled on federal highways and transported a judge whose official activities affected interstate commerce. *Id.* at 1315. Focusing on the "activity" of the targeted "property," the court reasoned that the truck's transportation function was independent of the judge's official functions; the two functions "[did] not blend into and become a part of" each other. *Id.* at 1316. Thus, the court held that the interstate commerce element in Section 844(i), though broad, "is not limitless," and that use of the property "must bear some real relationship to commerce." *Id.* at 1315.

2. By contrast, as the court below recognized, two other courts of appeals have adopted a substantially broader interpretation of the interstate commerce element of Section 844(i). In *United*

States v. *Stillwell*, the Seventh Circuit, relying principally on legislative history, held that Section 844(i) applied to a private residence that had "no connection to a commercial activity" but "merely receive[d] natural gas from out of state." 900 F.2d 1104, 1106, 1107 (7th Cir.), cert. denied, 498 U.S. 838 (1990). The court found that the house had a "connection with interstate commerce" because it received natural gas. *Id.* at 1109. The court held that connection to be more than *de minimis* because, "in the aggregate," the arson of private residences nationwide would have an impact on the market for natural gas. *Id.* at 1111. Unlike the Second Circuit's decision in *Mennuti* — which looked to the function of the property at issue, and which explicitly rejected the proposition that Section 844(i) could be satisfied by the receipt of "electric power and telephone service" (639 F.2d at 110) — the Seventh Circuit in *Stillwell* looked only for some "nexus" between the property and interstate commerce and then multiplied that nexus by the number of properties in the same "class" to determine whether the impact on interstate commerce is sufficient.[4]

The Fourth Circuit adopted the same interpretation in *United States* v. *Ramey*, holding that the burning of a private residence deep in the woods of West Virginia affected interstate commerce because the residence "receive[d] electricity * * * from an interstate power grid." 24 F.3d 602, 607 (1994). Like the home in *Stillwell*, the residence itself was not used in any commercial activity at all. As Judge Michael noted in dissent, the residence was "'used' only as a dwelling where its occupants carry out the general 'activity' of daily living." *Id.* at 610 (dissent). Nevertheless, the court concluded that the interstate commerce element was met (*id.* at 607):

> Though the [residence] doubtless consumed but a pittance of energy from the power company's grid, its consumption, combined with that of all similarly situated buildings, has a most definite effect on interstate commerce.

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[4] This rationale might make some sense if the purpose of Section 844(i) were to regulate the interstate distribution of natural gas, but it is an unjustified stretch in the context of a statute that has no such purpose.

3. This Court's decision in *Russell* provides significant support for the narrower construction of Section 844(i) adopted by the Second and Tenth Circuits and by the five dissenting judges in the present case. In *Russell*, the United States advanced precisely the same "natural gas" theory that the *Stillwell* court adopted and that the court below invoked. See Brief for the United States, *Russell* v. *United States*, No. 84-435, pp. 15-16. At oral argument, judicial skepticism of that theory was expressed. See *Russell* v. *United States*, Oral Argument Tr. 23 ("[I]t would be hard to imagine any building that would not fall under the coverage of this section under the government's test."). Significantly, this Court adopted a far narrower test that requires close examination of the activity constituting the basic function of the building at issue, and of the relationship of that activity to interstate commerce. Thus, this Court emphasized that Section 844(i) "*only* applies to property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862 (emphasis added). That formulation, which looks to the building's "use" rather than to some nebulous "nexus" with the outside world, accords closely with Judge Friendly's opinion in *Mennuti* and with the analysis urged by Chief Judge Arnold in dissent in this case.[5]

Even so, the courts of appeals disagree about the meaning and breadth of *Russell*. On the one hand, both *Stillwell* (900 F.2d at

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[5] The Fifth Circuit has adopted something of a hybrid approach in its interpretation of the scope of the interstate commerce element in Section 844(i). In *United States* v. *Shively*, the court suggested that the *Mennuti* and *Monholland* decisions were "question[able]" "in the wake of *Russell*," but it expressly declined to go "so far" as the Seventh Circuit in *Stillwell*. 927 F.2d 804, 808 (5th Cir.), cert. denied, 501 U.S. 1209 (1991). The court did, however, require a showing that the properties themselves (a house and car) were used in a commercial activity. Thus, the court upheld the conviction because the house was used as a business office for the defendant's interstate trucking company, and the car was "a company vehicle, leased in the name of [the defendant's] company and not himself personally." *Ibid.*; see also *United States* v. *Patterson*, 792 F.2d 531, 533-534 (5th Cir.) (the property must have "*some relationship* to an activity of commercial nature") (emphasis in original; internal quotation marks omitted), cert. denied, 479 U.S. 865 (1986).

1109) and *Ramey* (24 F.3d at 607) concluded that *Russell* has deprived *Mennuti* and *Monholland* of continuing force. Conversely, Chief Judge Arnold concluded in this case that the *Russell* decision *approved* the decisions in *Mennuti* and *Monholland*, inasmuch as *Russell* made clear that the inquiry under Section 844(i) must focus on the purported "activity" in which the subject property is "used." App., *infra*, 46a-48a & n.3. Similarly, the dissenting judge in *Ramey* stated that the "better-reasoned decisions such as *Mennuti*" should govern Section 844(i) analysis. 24 F.3d at 612; see also *United States* v. *Montgomery*, 815 F. Supp. 7, 9 n.2 (D.D.C. 1993) (rejecting the "natural gas" theory, and noting a conflict between *Stillwell* and the "better reasoned" opinion in *Mennuti*). This case presents an appropriate vehicle for resolving the conflict among the courts of appeals concerning the reach of Section 844(i).

At the same time, the Court would have the opportunity to resolve, once and for all, whether the government's persistently broad construction of Section 844(i) makes sense. Consistent with its argument in *Russell* (see *supra* page 10), the government sought a jury instruction in this case that treated the mere receipt of natural gas as a "use" of the building in an "activity affecting interstate commerce." Thereafter, it defended that instruction at every turn, arguing that it was a wholly permissible reading of the statute. See Brief of Appellee, at 46-47; Response to Petition for Rehearing of the United States of America, at 2; Supplemental Response to Petition for Rehearing of United States of America, at 3-7. If the government is correct, however, then every building — private and public alike, from the mom-and-pop grocery to the smallest cabin in the woods (provided it receives electricity or telephone service) — is subject to Section 844(i) jurisdiction. The government believes this, and took that position below (indeed, that is why it submitted the instruction in the first place). This case provides the Court a chance to examine that proposition.

B. The Court Of Appeals' Decision Cannot Be Reconciled With The Text Of Section 844(i)

1. The court of appeals' conclusion that the fitness center was "used in an activity affecting interstate commerce" makes hash of the statutory text. By its terms, Section 844(i) requires the

government to show that, at the time of the fire, the building was "used" in an "activity" and that the "activity" in question "affected interstate commerce." Under that language, as Chief Judge Arnold explained, "[t]he proper inquiry is into the function of the building itself, and then a determination of whether that function affects interstate commerce." App., *infra*, 47a; see also *Mennuti*, 639 F.2d at 110; *Patterson*, 792 F.2d at 533-534. None of the three predicates relied on by the court below meets that statutory standard. To say that this building was "used" in an "activity" affecting interstate commerce because it received natural gas or was owned by a non-resident of Iowa is about as true to the natural meaning of words as to say that a baseball bat is used as a hickory storage facility.

"[T]he marketable nature of the property" (App., *infra*, 7a) is not an "activity" at all — it is a *status*. What is more, it is a status enjoyed by every building in the United States. As Chief Judge Arnold explained for the dissenters, "[a]ll property will sell at some price" (*id.* at 15a), and thus all property is "marketable." If, as the court of appeals supposed, Section 844(i) is satisfied by simple "marketability" — by, what the court elsewhere termed, the building's "potential for ready reentrance as a functioning business in the commercial marketplace" (*id.* at 7a) — there would, in short order, be nothing left to the limitations contained in Section 844(i). Moreover, if the mere "potential" for "reentrance as a functioning business" were enough to satisfy Section 844(i), there would be nothing left to the clear command of the statute that the building be "used" in an "activity," not at some future moment of "reentrance," but *at the time of the fire*. See *Russell*, 471 U.S. at 862.

Exactly the same is true of the "ownership" rationale invoked by the court of appeals. Mere out-of-state ownership — even when coupled with a lease to what the court below conceded was simply "a corporate shell" (App., *infra*, 10a) — is not an "activity" at all, much less an activity that "affects interstate commerce." See *id.* at 15a (Arnold, C.J., dissenting) ("what is the 'activity' that the jury must find? Being owned?"). Like "marketability," "ownership" is a *characteristic* of the property, not an "activity" in which it is "used." And like marketability, "ownership" has no

logical stopping point. As Chief Judge Arnold explained, "[e]very building is owned by someone" (*ibid*).

The "natural gas" theory for establishing Section 844(i)'s interstate commerce element is equally defective. Being connected to a gas line is not an "activity." The ordinary meaning of the "activity" in which a building is "used" requires an "inquiry * * * into the function of the building itself." App., *infra*, 47a (dissent). The building in this case was not "used" to consume natural gas;[6] indeed, it was not "used" at all. The building's receipt of natural gas was wholly incidental to the building's *former* function, which was to provide facilities for athletic recreation. By the time of the fire, that function was long since over, and no new "activity affecting interstate commerce" had taken its place.

2. The court of appeals purported to base its "sweeping" (App., *infra*, 10a) construction of Section 844(i) on this Court's decision in *Russell*, but *Russell* provides cold comfort. Far from approving such nebulous concepts as "potential" marketability, the Court rigorously insisted that the government prove a use of the building in an activity "at the time [the defendant] attempted to destroy it by fire." 471 U.S. at 862. The Court upheld the conviction in *Russell* only because the government succeeded in carrying the burden of proving that the building in question was rental property at the time of the fire.

Not so in the Eighth Circuit. For the Eighth Circuit, it is enough that the market "fully expected [the fitness center] to become productive again." App., *infra*, 7a. No matter that the building was closed down, unmarketed, conducting no business. In the court of appeals' view, so long as the property was "marketable" (even if not *marketed* at the time of the fire), and had a "potential for reentrance as a functioning business" (even if no such "reentrance" had taken place at the time of the fire), Section 844(i) would cover the case.

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[6] Cf. *Ramey*, 24 F.3d at 610 (Michael, J., concurring in part and dissenting in part) ("electricity consumption is not the 'activity' for which the [residence] is 'used'").

Russell does not extend that far. To the contrary, just as the Court declined the government's (inveterate) invitation to embrace the "natural gas" theory, so too did the Court foreclose any suggestion that mere "potentials" and "possibilities" are enough. The words of the statute mean what they say: the building must be "used" at the time of the fire "in an[] activity affecting interstate * * * commerce." The court of appeals' decision cannot be squared with that statutory command.[7]

C. The Question Presented Is Both Recurring And Important

The courts of appeals are called on with increasing frequency to articulate the parameters of the commerce element in Section

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[7] The court of appeals also purported to find support for its expansive reading of Section 844(i) in a line of cases holding that a "temporary cessation" of business activity does not remove a building from the ambit of the anti-arson statute. See App., *infra*, 6a (citing cases). Those cases, however, are sharply distinguishable. In none of them was the building simply out of business, and permanently so, at the time of the fire. Rather, in each instance there was a brief, and temporary, interruption in business as usual. See, *e.g.*, *United States* v. *Parsons*, 993 F.2d 38, 41 (4th Cir.) (property remained "rental property" even though it was temporarily vacant at the time of the fire), cert. denied, 114 S. Ct. 266 (1993); *United States* v. *Shockley*, 741 F.2d 1306, 1307 (11th Cir. 1984) (restaurant remained business property even though it was closed for repairs at the time of the fire); *United States* v. *Turner*, 995 F.2d 1357, 1362 (6th Cir.) (rental property did not lose character as such even though it had been vacant for two weeks at time of fire and evidence showed that owner intended to re-rent the property), cert. denied, 114 S. Ct. 282 (1993); *United States* v. *Doby*, 872 F.2d 779, 780 (7th Cir. 1989) (per curiam) (owner had never taken property off rental market, even though it was vacant at time of fire). In the present case, by contrast, the fitness center had been shut down for nearly a month at the time of the fire; had never been placed on the rental or sales market; and was being used in no activities of any kind -- except for such inert "activities" as "potential marketability," receipt of natural gas, and "being owned" by an out-of-state owner.

844(i).[8] What is more, apart from its inherent importance as a question of federal statutory construction, the question whether Section 844(i) applies to otherwise private facilities — simply because they are "marketable" in "nature," receive interstate utilities, or have an out-of-state owner — raises substantial issues of federalism. Section 844(i) does not, after all, cover all arsons of all buildings. It covers only those arsons of buildings "used in interstate commerce" or "used * * * in an[] activity affecting interstate * * * commerce." The limitation effected by that language is designed to prevent precisely the kind of wholesale federalization of arson that is accomplished by the decision below, which extends federal jurisdiction over every structure (and vehicle) in the nation that is "marketable in nature," uses natural gas, electricity, or even gasoline, and has an owner who resides out of state.

Such an incursion tramples established notions of federalism and warrants further review.[9] This Court has admonished that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). Because "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," this Court has

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[8] See, *e.g.*, *United States* v. *Menzer*, 29 F.3d 1223, 1229-1230 (7th Cir.), cert. denied, 115 S. Ct. 515 (1994); *United States* v. *Miller*, 24 F.3d 1357, 1360-1361 (11th Cir. 1994); *Ramey*, 24 F.3d at 606-607; *Turner*, 995 F.2d at 1361; *United States* v. *Lake*, 985 F.2d 265, 268-269 (6th Cir. 1993); *Shively*, 927 F.2d at 807-808; *United States* v. *Medeiros*, 897 F.2d 13, 15-17 (1st Cir. 1990); *United States* v. *Mayberry*, 896 F.2d 1117, 1120 (8th Cir. 1990).

[9] This Court has repeatedly reversed circuit court rulings adopting overly broad constructions of federal criminal statutes. See, *e.g.*, *Tanner* v. *United States*, 483 U.S. 107, 131 (1987) (18 U.S.C. 371; conspiracy to defraud the United States); *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) (18 U.S.C. 1341; mail fraud); *United States* v. *Maze*, 414 U.S. 395, 405 & n.10 (1974) (same); see also *United States* v. *Kozminski*, 487 U.S. 931, 951-952 (1988) (18 U.S.C. 241, 1584; involuntary servitude).

required a clear statement in the statutory language that indicates that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved" in altering the relationship between federal and state criminal jurisdiction. *Ibid.* As demonstrated *supra*, there is no such clear signal that Congress intended to afford Section 844(i) the almost limitless reach given to it by the court below.[10]

There is, finally, the importance to petitioner: As Chief Judge Arnold explained, Dale Ryan "is in jail for life" (App., *infra*, 16a) on a conviction arising from the burning of a building that, on this record, was by no plausible reckoning "used in an activity affecting interstate commerce." Five judges of the Eighth Circuit concluded that petitioner's conviction should be reversed. That was assuredly correct: By accepting "marketability," out-of-state ownership, and the receipt of natural gas as sufficient to satisfy the interstate commerce element, the court of appeals completely misread (indeed, ignored) the text of Section 844(i). It is "inconceivable that the Framers of the Commerce Clause or even the Congress that approved Section 844(i) contemplated" that Section 844(i) would have such dramatic breadth. *Montgomery*, 815 F. Supp. at 11.

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[10] The costs to state sovereignty and to federal law enforcement posed by this extension of federal jurisdiction are not merely theoretical. In 1991, for example, there were approximately 46,478 arsons involving the burning of structures, and 21,917 arsons involving motor vehicles. Federal Bureau of Investigation, Uniform Crime Reports for the United States — 1991, 54-55 (1992). Under the approach adopted by the majority below, virtually all of those arsons would likely become federal offenses. The decision below — and the authorities it chiefly relied on — completely ignore these significant federalism concerns. In contrast, Chief Judge Arnold's dissents recognize those concerns, and offer an interpretation of Section 844(i)'s interstate commerce element that is faithful to the language and history of the statute, and to the proper balance between federal and state criminal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1995

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

No. 92-1357

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

v.

DALE LYNN RYAN, APPELLANT.

Submitted March 8, 1994
Decided Oct. 31, 1994

Before RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON, Senior Circuit Judge, McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges, En Banc.[1]

WOLLMAN, Circuit Judge.

A divided panel of this court affirmed Dale Lynn Ryan's conviction of violating the federal arson statute, 18 U.S.C. § 844(i). *United States v. Ryan*, 9 F.3d 660 (8th Cir.1993). We granted rehearing en banc and vacated the panel opinion. Having considered the issue raised by the suggestion for rehearing en banc, we now affirm, and we reinstate the panel opinion as to the other issues raised in Ryan's initial appeal.

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[1] MURPHY, Circuit Judge, took no part in the consideration or decision of this case.

I.

We recount only those facts relevant to the issue remaining in this case, referring the reader to the panel opinion for the facts giving rise to the charge against Ryan.

In January 1989, Ryan began managing the Ryan Fun and Fitness Center (the Fitness Center), a business located in West Burlington, Iowa, and owned by Ryan's father, Ronald D. Ryan, a Kansas resident. On December 6, 1989, after an unsuccessful year, Ryan's father ordered the Fitness Center closed. Ryan and his father then began efforts to sell the business. Ryan took a photographic inventory of the interior and had a real estate agent inspect the property for purposes of conducting a market value analysis. Ryan also removed his personal property from the building on December 26 in anticipation of a quick sale.

On January 1, 1990, fire engulfed the Fitness Center. Two volunteer fire fighters died fighting the blaze. A jury convicted Ryan of violating the federal arson statute, 18 U.S.C. § 844(i), and the district court sentenced him to 328 months in prison. Ryan appealed, raising several issues. As set forth above, a divided panel of this court rejected all of Ryan's arguments and affirmed his conviction.

II.

Title 18, section 844(i) of the United States Code makes arson of any building or property used in interstate commerce or in any activity affecting interstate commerce a federal crime, providing:

> Whoever maliciously damages or destroys ... by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not more than ten years or fined not more than $10,000, or both; ... and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(emphasis added).

With respect to section 844(i)'s interstate commerce requirement, the district court gave the jury the following instruction:

> "Interstate commerce" means trade, or business, or travel between the states. "Used in an activity affecting interstate commerce" means to affect in some way trade, or business, or travel between the states.
>
> If you find from the evidence beyond a reasonable doubt that, on or about January 1, 1990, the Ryan Fun and Fitness Center building was owned by Ronald D. Ryan, a resident of Kansas, and leased by him to Ryan Air Services, Inc., a Kansas Corporation, then the required affect [sic] on interstate commerce has been proved; or if you find from the evidence beyond a reasonable doubt that on January 1, 1990, the Ryan Fun and Fitness Center building was supplied with natural gas used to heat the building, and such natural gas was supplied from outside of the state of Iowa, then the required affect [sic] on interstate commerce has been proved. If you do not so find, then the required affect [sic] on interstate commerce has not been proved and you must find the defendant not guilty.

Jury Instruction Number 10. Ryan argues that neither of the bases set forth in the instruction — the out-of-state ownership and lease agreement, and the supply of natural gas from an out-of-state source — satisfies section 844(i)'s interstate commerce nexus requirement.

Ryan did not object to this instruction at trial. Accordingly, we review the challenge to Instruction Number 10 under the plain error standard of review. Fed. R. Crim. Pro. 52(b); *United States v. Olano*, --- U.S. ---, ---, 113 S.Ct. 1770, 1776 (1993). Ryan argues, however, that plain error review is inapplicable because the interstate commerce element of the offense also describes the basis for subject matter jurisdiction, which is not waivable and therefore may be raised at any stage of the proceeding.

Our cases have described the interstate commerce element of section 844(i) as constituting a jurisdictional predicate of the substantive offense. *United States v. Voss*, 787 F.2d 393, 396-97 (8th Cir.), *cert. denied*, 479 U.S. 888, 107 S.Ct. 286, 93 L.Ed.2d 261 (1986) (substantive element of offense also confers jurisdiction); *see United States v. Mayberry*, 896 F.2d 1117, 1119-20 (8th Cir. 1990); *United States v. Hansen*, 755 F.2d 629, 630-31 (8th Cir.), *cert. denied*, 474 U.S. 834, 106 S.Ct. 105, 88 L.Ed.2d 85 (1985); *United States v. Michaels*, 726 F.2d 1307, 1309-10 (8th Cir.), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984). *See generally United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (noting that an interstate commerce nexus requirement "in criminal and civil statutes is most often for the purpose of conferring federal jurisdiction rather than of defining substantive elements of an offense"), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). Other circuits also recognize this element of the crime of arson as the basis for jurisdiction under section 844(i). *See United States v. Turner*, 995 F.2d 1357, 1361-62 (6th Cir.), *cert. denied*, --- U.S. ----, 114 S.Ct. 282, 126 L.Ed.2d 232 (1993); *United States v. Medeiros*, 897 F.2d 13, 15-17 (1st Cir. 1990); *United States v. Doby*, 872 F.2d 779, 780 (7th Cir. 1989) (per curiam), *aff'g*, 684 F. Supp. 558 (N.D. Ind. 1988); *United States v. Shockley*, 741 F.2d 1306, 1307 (11th Cir. 1984) (per curiam); *United States v. Grossman*, 608 F.2d 534, 535-37 (4th Cir. 1979).

The district court had subject-matter jurisdiction in this case by virtue of the fact that Ryan was charged with an "offense against the United States." 18 U.S.C. § 3231. The interstate commerce aspect of this case arises merely as an element of the section 844(i) offense. If that element is not satisfied, then Ryan is not guilty; but the court is not by the failure of proof on that element deprived of judicial jurisdiction. Ryan could have raised the question whether Congress had exceeded the power granted to it under the Commerce Clause—a question of legislative jurisdiction. Having not been raised, that constitutional question has no bearing on whether we have jurisdiction to proceed in this case.

III.

In enacting section 844(i), Congress intended to exercise its full power under the Commerce Clause of the Constitution. *Russell v. United States*, 471 U.S. 858, 859 & n.4, 105 S.Ct. 2455, 2456 & n. 4, 85 L.Ed.2d 829 (1985); *Mayberry*, 896 F.2d at 1119-20. The statute is intended to protect all business property. *Russell*, 471 U.S. at 862, 105 S.Ct. at 2457; *Mayberry*, 896 F.2d at 1120. Indeed, section 844(i) reaches arson of any property having even a *de minimis* connection to interstate commerce. *Mayberry*, 896 F.2d at 1120; *Voss*, 787 F.2d at 397. This standard is easily met, even when the property is temporarily closed or vacant. *Mayberry*, 896 F.2d at 1120; *United States v. Hermes*, 847 F.2d 493, 496 (8th Cir.1988) (per curiam).

In *Voss*, while acknowledging the *de minimis* standard as sufficient to satisfy the statute, we recognized that limits do exist on the reach of section 844(i). 787 F.2d at 397-400. Although we held in *Voss* that the purchase of out-of-state insurance standing alone was insufficient, we recognized that there were additional facts in the record sufficient to satisfy the *Russell* standard under a proper jury instruction. *Id.* at 398.

Our subsequent cases have continued to acknowledge the expansive scope of section 844(i). Thus, we have held that section 844(i) extends to temporarily closed businesses. In *Mayberry*, we found that section 844(i) was applicable to a building containing a sawmill that had been out of operation for a month because of a lack of logs to cut. 896 F.2d at 1120. We noted that at the time of the fire the mill would have been operational had there been logs available to cut, that the mill still received electricity, and that there was an ongoing lease between the owner of the premises and the operator of the sawmill. *Id.* at 1119. All things considered, the sawmill still affected, and could affect, interstate commerce. Likewise in the present case, had there been a sufficient number of clients to serve at the Fitness Center, they could readily have been served in keeping with the nature of the property.

In *Hermes*, we found that an unleased commercial building was within the scope of section 844(i). 847 F.2d at 496. We noted that the owner of the property had advertised its availability for use and that the property was in fact available for commercial

use. *Id.* We further stated that the fact that the building was not "occupied by a tenant does not detract from its character as commercial property." *Id.* The emphasis on the character of the property warrants note because it acknowledges the importance of the broader commercial market. As was true of the property in *Hermes*, the Fitness Center constituted property having an available use and thus was suited for the broader commercial market and perforce fell within the broad scope of 844(i).

In *United States v. Shriver*, we found that a temporarily closed nightclub being rehabilitated at the time of the arson was property used in an activity affecting interstate commerce. We noted that a "successful reopening would return the establishment to the market place." 838 F.2d 980, 983 (8th Cir.1988).

Our broad interpretation of section 844(i) is fully in accord with that of other circuits. In *Turner*, the Sixth Circuit, in upholding a conviction for arson of vacant rental property, stated that "property routinely used in interstate commerce activity does not lose its interstate characteristics because of a temporary cessation of that activity." 995 F.2d at 1362. Likewise, in *Medeiros*, the First Circuit found ample precedent for the proposition "that strictly contemporaneous connections [are] not required to meet the interstate commerce requirement." 897 F.2d at 17; *see also Doby*, 872 F.2d at 780 (vacant home with advertised rental unit maintained sufficient nexus); *Shockley*, 741 F.2d at 1307 (building closed for repairs retained its interstate character); *Grossman*, 608 F.2d at 536-37 (rejecting argument that "844(i) requires a contemporaneous connection with interstate commerce without regard to" other considerations). *Cf. United States v. Patterson*, 792 F.2d 531, 533-34 (5th Cir.) (finding partially completed condominium units "'used' within the meaning of" section 844(i)), cert. denied, 479 U.S. 865, 107 S.Ct. 220, 93 L.Ed.2d 149 (1986).

Prior to its closing, the Fitness Center was business property with firmly established connections to interstate commerce. We find pervasive evidence in the record that the Fitness Center maintained a sufficient post-closing nexus with interstate commerce to bring it within the reach of the statute. The property was commercial in nature, and the totality of circumstances indicates

that it was embraced by the recognized meaning and intent of section 844(i) despite a cessation of its operation as the Fitness Center.

There is manifold evidence that the Fitness Center was about to be placed on the market for sale. Both Ryan and his father detailed their discussions with real estate agents, the elder Ryan testifying that the property, while not formally listed, was "verbally listed" in an attempt to sell it quickly before winter ended. Ronald Ryan, VI. Tr. at 171, 157. Additional preparations for cleaning the facility and Ryan's removal of his personal property further indicate the marketable nature of the property and its potential for ready reentrance as a functioning business in the commercial marketplace.

We need not rely solely on the preparations for the sale of the property, because there is ample other evidence of a connection to interstate commerce. The short duration of the closure, receipt of utility services for much of the month and continued receipt of natural gas, Ryan's continued presence on his father's payroll as manager of the Fitness Center through January 28, 1990, and the lease arrangement itself all lead to the conclusion that the Fitness Center was an instrumentality of interstate commerce for purposes of satisfying the requirements of section 844(i).

The Fitness Center was business property that the broader commercial market continued to embrace despite its inefficiencies with respect to the particular purpose for which it was operated. The market fully expected it to become productive again. Neither the building itself nor its commercial nature had been abandoned. *See Hermes*, 847 F.2d at 496 (vacant rental property still retains commercial character); *Shockley*, 741 F.2d at 1307 (closed restaurant retained its "interstate character"). In short, the Fitness Center was the type of property that Congress intended to include within the ambit of section 844(i).

Ryan raises the concern that to uphold the application of section 844(i) in this case would *de facto* federalize all arson cases. This concern is misplaced. Our interpretation of section 844(i) need not, and does not, go so far as those cases that have found the receipt of electricity or natural gas by a purely private residence to constitute a connection with interstate commerce sufficient to satisfy

the requirements of section 844(i). *See United States v. Ramey*, 24 F.3d 602 (4th Cir.1994); *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.), *cert. denied*, 498 U.S. 838, 111 S.Ct. 111, 112 L.Ed.2d 81 (1990). Suffice it to say that all of the circumstances of this case, when viewed in the light of the Court's holding in Russell and of our prior decisions regarding temporarily closed commercial property, lead to the conclusion that the Fitness Center was covered by the broad reach of section 844(i).

IV.

A. Jury Instruction on Required Interstate Commerce Nexus

Satisfied that a sufficient factual basis existed to warrant the application of section 844(i), we must determine if the jury instructions sufficiently defined the interstate commerce nexus required to fit the definition of the crime. Jury verdicts are not supportable when based on instructions that do not require the proper finding of facts to support each element of the crime. *Voss*, 787 F.2d at 398; see *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979). Additionally, a verdict based on jury instructions that provided alternative bases for a finding, one of which is legally inadequate, is presumed to have rested on the insufficient basis. *See Griffin v. United States*, 502 U.S. 46, —, 112 S. Ct. 466, 474, 116 L.Ed.2d 371 (1991); *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir.1992), *cert. denied*, — U.S. —, 113 S. Ct. 967, 122 L.Ed.2d 123 (1993); *see also United States v. Wilkinson*, 26 F.3d 623, 625 (6th Cir. 1994) (jury instructions inaccurately defining elements of offense may rise to level of plain error).

Each of the bases set out in Instruction Number 10 must be reviewed for prejudicial error. Our analysis of the challenged instruction is distinguished from that employed in *Voss*. We analyze properly objected to jury instructions under the harmless error standard of Federal Rule of Criminal Procedure 52(a). *See Voss*, 787 F.2d at 398. Because Instruction Number 10 was not objected to at trial, however, we analyze its validity in terms of plain error in accordance with Federal Rule of Criminal Procedure 52(b). *United States v. Young*, 470 U.S. 1, 15-16, 105 S. Ct. 1038, 1046-1047, 84 L.Ed.2d 1 (1985); *see United States v. Bettelyoun*,

16 F.3d 850, 852 (8th Cir.1994) (reviewing jury instruction for plain error).

Plain error review involves a three-step analysis: (1) the district court must have committed an error, (2) that error must be plain, i.e., it must be clear under current law, and (3) the error must affect the defendant's substantial rights. *Olano*, --- U.S. at ---- - ----, 113 S. Ct. at 1776-78; *United States v. Montanye*, 996 F.2d 190, 192 (8th Cir.1993) (en banc). We recently summarized the plain error rule as follows:

> The plain error standard affords a court of appeals the discretion to provide a remedy for an aggrieved defendant who demonstrates that there was an error, which is a deviation from an unwaived legal rule; the error was plain, meaning clear or obvious; and the error affected the defendant's substantial rights, which requires a showing that the error was prejudicial and affected the trial's outcome.

United States v. Johnson, 12 F.3d 827, 835 (8th Cir.), *cert. denied*, --- U.S. ----, 114 S. Ct. 1860, 128 L.Ed.2d 482 (1994).

If a forfeited error meets the foregoing requirements, we have discretionary authority to order its correction. *Olano*, --- U.S. at ----, 113 S. Ct. at 1778; *Johnson*, 12 F.3d at 835; *Montanye*, 996 F.2d at 192. We should exercise that discretion when the error results in a miscarriage of justice or "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, --- U.S. at ----, 113 S. Ct. at 1779 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)); *Montanye*, 996 F.2d at 192.

The burden of proving plain error is on the party asserting it. *See*, e.g., *United States v. Jennings*, 12 F.3d 836, 838-39 (8th Cir.1994); *United States v. Ragan*, 952 F.2d 1049, 1049 (8th Cir.1992). We conclude that Ryan has failed to show that any error in the district court's instruction "is clear under current law." *Olano*, --- U.S. at ----, 113 S. Ct. at 1777.

To properly determine whether any error is clear under current law, we must refer to our earlier overview of the required interstate commerce nexus under section 844(i). It is clear that an instruction

could have been formulated and presented under these facts sufficient to allow a proper jury finding of the requisite interstate nexus. It is not so clear, however, that the instruction actually given was a plainly impermissible broadening of 844(i)'s scope.

Instruction Number 10 states that if the jury found that the Fitness Center building was owned by Ronald Ryan, a Kansas resident, and leased by him to Ryan Air Services, Inc., a Kansas corporation, then the required effect on interstate commerce had been proved. Although we have never held out-of-state ownership sufficient on its own terms to satisfy the elements of section 844(i), that status, coupled with the lease arrangement, is not a plainly inaccurate showing of sufficient ties to interstate commerce. *Russell* itself characterized a purely local lease as part of a broader commercial market. 471 U.S. at 862, 105 S.Ct. at 2457. The Ryan lease, although transacted through a corporate shell, indicates the marketable nature of the property. Additionally, Ryan's father manifested his ownership status through the exercise of direct, final control over the property in a necessarily interstate manner. In light of how broadly the *Russell* Court, our decisions, and other circuits have construed section 844(i), we cannot find that this portion of the instruction constituted plain error.

The instruction alternatively states that a finding that the Fitness Center was supplied with natural gas from outside Iowa sufficiently established the required effect on interstate commerce. We have not ruled on whether receiving out-of-state natural gas by itself satisfies section 844(i)'s interstate commerce requirement. In *Hansen*, we indicated that reliance on the use of electricity transported through interstate commerce to confer jurisdiction "would seem to stretch the notion of interstate commerce beyond the limits of logic." 755 F.2d at 631 n.4. *Hansen*, however, was decided before the *Russell* Court's recognition of the sweeping jurisdictional scope of the statute.

Although we find it unnecessary to determine whether the receipt and use of natural gas or electricity transported in interstate commerce is alone sufficient to satisfy the requirements of section 844(i), we note, without expressing any agreement with those decisions, that two of our sister circuits, relying on *Russell*, have gone beyond even the challenged instruction's approach. In

Stillwell, the Seventh Circuit held that section 844(i)'s reach extends to private residences whose only nexus with interstate commerce is the receipt of natural gas transported by an interstate pipeline. 900 F.2d at 1107-10. More recently, in *Ramey*, the Fourth Circuit found that the receipt by a private residence of electricity furnished through an interstate power grid satisfied the statute's interstate commerce requirement. 24 F.3d at 607.

Putting aside *Ramey*, which was not decided until after Ryan had been tried and convicted, and *Stillwell*, Ryan has still failed to meet his burden of proving clear error under our applicable circuit case law regarding the application of section 844(i) to temporarily closed commercial properties. We cannot say that an unobjected-to instruction on the sufficiency of the receipt of natural gas by a temporarily closed commercial entity constitutes remediable plain error. Accordingly, "[b]ecause the district court did not violate our current cases ..., the first two limitations on our appellate authority under Rule 52(b) are not overcome." *Montanye*, 996 F.2d at 193.

B. Jury Instruction Regarding Proximate Cause

Although we granted rehearing solely on the basis of the interstate commerce nexus issue, Ryan also raised by way of a footnote in his brief a challenge to Jury Instruction Number 13, which set out the causal elements necessary for the jury to hold Ryan responsible for the deaths of the fire fighters. Section 844(i) provides that the deaths must be the "direct or proximate result of" the arson. With respect to the proximate cause requirement, the district court gave the following instruction:

> The deaths of William Klein and Joseph Wilt resulted from defendant's conduct of setting the fire if his conduct was a proximate cause of their deaths. Defendant's conduct was a "proximate cause" of their deaths if it was a substantial factor in causing them to die on January 1, 1990, and they would not have died then except for defendant's conduct.
>
> "Substantial" means that defendant's conduct has such an effect in producing the deaths as to lead a reasonable person to regard his conduct as a cause of the deaths. An event, such as the deaths of William Klein and Joseph

> Wilt, may have more than one proximate cause. The government need not prove that defendant's conduct was the only proximate cause of their deaths; it needs to prove only that defendant's conduct was a proximate cause of their deaths.

Jury Instruction Number 13. Ryan challenges this Instruction as denying the jury an opportunity to determine whether the necessary element of reasonable foreseeability was met. We conclude, however, that the legal principle of proximate cause embodied in section 844(i) was adequately presented to the jury. The panel decision appropriately disposed of this matter, and we reinstate the panel opinion on this issue as well.

The judgment of conviction is affirmed.

MORRIS SHEPPARD ARNOLD, Circuit Judge, concurring in the judgment.

I concur in the judgment in this case because I do not believe that the district court's error, if any, was plain, since the defendant has not demonstrated that it "affected the outcome of the District Court proceedings." *United States v. Olano*, --- U.S. ----, ----, 113 S. Ct. 1770, 1778, 123 L.Ed.2d 508 (1993).

I write separately simply to express my regret that the court passes up an opportunity explicitly to overrule those cases of ours that hold (or say) that the statutory requirement of an interstate commerce nexus in cases like this goes to the jurisdiction of the federal courts. It does not. A connection to interstate commerce is merely an element of the statutory offense, and, if proof of it is missing, the defendant is entitled to an acquittal. But the federal courts had statutory jurisdiction in the first place to try the case because the government charged the defendant with a federal crime, and they do not lose jurisdiction because of a failure of proof. A failure to prove the interstate commerce element no more deprives us (or the district court) of jurisdiction than would a failure to prove that a building was burned down. Both these facts are merely elements of the crime; neither is jurisdictional. The court seems to recognize this legal proposition at one point in its opinion, yet it also cites cases standing for the opposite proposition without overruling them. Since I see the present configuration of the

opinion as internally inconsistent, I respectfully dissent from so much of it as implies the continued validity of the idea that an interstate commerce nexus has jurisdictional significance in cases like the present one.

RICHARD S. ARNOLD, Chief Judge, with whom McMILLIAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge, join, concurring in the judgment in part and dissenting in part.

The appellant, Dale Ryan, advances three arguments as possible bases for reversal of his conviction in his petition for rehearing en banc. Each argument derives from his assertion that Jury Instructions 10 and 13 are a misstatement of the law under 18 U.S.C. § 844(i). First, he argues that instruction 10 was inadequate to establish subject-matter jurisdiction. In a related argument, he contends that the District Court failed to instruct the jury properly on an essential element of section 844(i). Finally, he suggests that Instruction 13 failed to present properly the issue of reasonable foreseeability to the jury. I agree with the result reached by the Court with regard to arguments one and three presented by the appellant. However, with respect to argument two, I am compelled to dissent from the Court's conclusion that the instruction was not plain error. In all other respects, I concur in the decision to reinstate the panel opinion.

When conducting a plain-error review, this Court is guided by Federal Rule of Criminal Procedure 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [district] court." A Rule 52(b) review requires: 1) actual error; 2) plain under current law; 3) that affects substantial rights. *United States v. Olano*, --- U.S. ----, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993).

Jury Instruction 10 stated in part:

> "Interstate commerce" means trade, or business, or travel between the states. "Used in an activity affecting interstate commerce" means to affect in some way trade, or business, or travel between the states.
>
> If you find from the evidence beyond a reasonable doubt that, on or about January 1, 1990, the Ryan Fun and

> Fitness Center building was owned by Ronald D. Ryan, a resident of Kansas, and leased by him to Ryan Air Services, Inc., a Kansas Corporation, then the required effect on interstate commerce has been proved; or if you find from the evidence beyond a reasonable doubt that on January 1, 1990, the Ryan Fun and Fitness Center building was supplied with natural gas used to heat the building, and such natural gas was supplied from outside of the state of Iowa, then the required effect on interstate commerce has been proved. If you do not so find, then the required effect on interstate commerce has not been proved and you must find the defendant not guilty.

I have already explained why I consider the instruction incorrect. *Ryan v. United States*, 9 F.3d 660, 675-76 (8th Cir. 1993) (dissenting opinion). Interestingly, the panel did not mention the fact that trial counsel (not the same lawyers as those now representing Ryan) did not object to the instruction. The panel opinion simply addresses the instruction on the merits and upholds it. *Id.* at 665-67. It says nothing about "plain error." This represents, I suppose, that the panel was holding, *sub silentio*, both that the error, if there were one, would be "plain," and that, in that event, we should exercise our discretion to reach it. It seems extraordinary to me that the Court en banc now shrinks from deciding the merits. The panel opinion decided the issue on the merits in such a way as to cause a majority of the Court to rehear the case en banc. The Court en banc now decides the case on the basis of a procedural default that was argued to the panel but necessarily excused by the manner of the panel's disposition.

Under our practice, however, the order granting the suggestion for rehearing en banc automatically vacates the panel opinion. So we now write on a clean slate, and I concede that the Court en banc has power to adopt a position that the panel seemingly rejected, even though by doing so it arguably wastes on a procedural discussion the scarce resource of an en banc proceeding, a proceeding initiated in the first place with the thought of deciding on the merits an important question of statutory construction affecting the boundary between federal and state criminal prosecutions. At least the en banc Court is not approving the instruction that was given, and I take some comfort in that.

I will not repeat here my reasons for believing an error occurred. The question is whether the error was "plain," in the sense of clear or obvious. I believe this is true with respect to both "prongs" (forgive the cliche) of the instruction, and, as the Court notes, ante at 8, if either suggested basis of interstate nexus was wrong, the conviction is infirm.

First, as to the ownership of the building by a Kansas resident and its being leased to a Kansas corporation: As the Court says, ante at 10, "we have never held out-of-state ownership sufficient on its own terms to confer jurisdiction...." On the contrary, we have held virtually the opposite. In *United States v. Voss*, 787 F.2d 393, 396-98 (8th Cir.), *cert. denied*, 479 U.S. 888, 107 S.Ct. 286, 93 L.Ed.2d 261 (1986), we held that a building's being insured by an out-of-state company was not sufficient to bring it within the statute. The interstate financial effect of out-of-state ownership and that of out-of-state insurance coverage seem indistinguishable to me. That the Kansas owner, for business purposes of his own, leased the property to his controlled Kansas corporation adds nothing. Of course the property is marketable. The owner can lease it to himself. He can also sell it to someone else. All property will sell at some price.

What the Court fails to take into account, I think, is the phrasing of the statute. It refers not to a building whose destruction will affect interstate commerce, but to the destruction of a "building used ... in ... any activity affecting interstate ... commerce...." Under the jury instruction in question, what is the "activity" that the jury must find? Being owned? Every building is owned by someone, though every building is not insured. *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985), on which the Court relies, was decided before our Voss decision, and *Voss* discusses *Russell*. *Russell*, in any event, continues to stress that the statute "[b]y its terms ... only applies to property that is 'used' in an 'activity' that affects [interstate] commerce." 471 U.S. at 862, 105 S.Ct. at 2457 (emphasis added). The building in *Russell* was being rented to apartment dwellers at the time of the fire. The building here was just cumbering the ground. *Cf.* Luke 13:7 (King James). It was not being "used" in any "activity."

The instruction also permitted conviction upon a finding that the building was being supplied with out-of-state natural gas. Is being connected to a gas line an "activity"? We indicated to the contrary in *United States v. Hansen*, 755 F.2d 629, 631 n.4 (8th Cir.), *cert. denied*, 474 U.S. 834, 106 S. Ct. 105, 88 L.Ed.2d 85 (1985) (electricity). It is true that *Russell* was decided after Hansen (by four months), but the point is that there must be an *activity* affecting interstate commerce. Here there is none. I find somewhat disturbing the Court's attempt to bolster its holding by citing cases from other circuits (one of which, *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.), *cert. denied*, 498 U.S. 838, 111 S.Ct. 111, 112 L.Ed.2d 81 (1990), was actually *disapproved* by the panel in this case, 9 F.3d at 667). The district courts are obligated to follow our cases, not divergent authorities from other circuits. It is "our current cases" that we look to in plain-error analysis. *United States v. Montanye*, 996 F.2d 190, 193 (8th Cir.1993) (en banc).

So I think there was plain error here. The next stage of the inquiry is whether the error affected Ryan's substantial rights. A defendant's substantial rights are affected when prejudice is shown. The defendant "bears the burden of persuasion with respect to prejudice." *Olano*, --- U.S. at ----, 113 S. Ct. at 1778. Thus, "in most cases," a defendant must demonstrate that the error was prejudicial in that it "affected the outcome of the District Court proceedings." *Ibid.* Here, the instruction was erroneous with regard to an essential element of the crime. Had the jury been properly instructed in this case, it could have reached a different conclusion. Consequently, the judicial proceeding was compromised, and Ryan was unavoidably prejudiced.

I discuss briefly the final step in plain-error analysis. Even when there is "plain error," we still have discretion whether to decide the point. Several reasons convince me we should exercise this discretion affirmatively. Ryan is in jail for life. He has an obvious ineffective-assistance-of-counsel claim (failure to object to instruction 10) which will be raised in the inevitable Section 2255 motion. Such a claim is, to say the least, not insubstantial. Why not go ahead and decide it now, and save the District Court and ourselves the trouble of enduring a collateral proceeding? And finally, the issue is one of great public importance, transcending

this particular case: How far did Congress intend to go in taking over for the federal government an area of criminal justice customarily handled by the States?

I respectfully dissent in part.

LOKEN, Circuit Judge, concurring in part and dissenting in part.

I agree with Chief Judge Arnold that the district court committed plain error in the supplied-with-natural-gas portion of its Jury Instruction 10, that that error affected Ryan's substantial rights, and that we should exercise our discretion to decide this issue on the merits. To that extent, I respectfully dissent in part. In all other respects, I concur in the opinion of the Court.

APPENDIX B

No. 92-1357SIDM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH COURT

UNITED STATES OF AMERICA, APPELLEE

v.

DALE LYNN RYAN, APPELLANT

January 5, 1994, Decided

Original Opinion of October 26, 1993, Reported at: *1993 U.S. App. LEXIS 27707.*

OPINION: Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is granted. The opinion and judgment of October 26, 1993, are vacated. An order setting the time ard place for oral argument will be entered on a later date.

January 5, 1994

APPENDIX C

No. 92-1357

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE,

v.

DALE LYNN RYAN, DEFENDANT/APPELLANT.

Submitted Oct. 12, 1992
Decided Oct. 26, 1993

Rehearing and Rehearing En Banc Granted;
Opinion and Judgment Vacated
Jan. 5, 1994

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN, Circuit Judge, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

Dale Lynn Ryan appeals from final judgment entered in the district court[1] upon a jury verdict finding him guilty of arson, in

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* The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1] The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

violation of 18 U.S.C. § 844(i). As a result of the arson, two volunteer firefighters died. Ryan was sentenced to 328 months of imprisonment. On appeal, Ryan asserts a *Brady* violation, denial of due process and his Sixth Amendment rights stemming from references to his retention of counsel, and four distinct errors in jury instructions. In addition, Ryan argues that the use of special verdict interrogatories was improper, that he was convicted of murder without a showing of culpability, that the sentencing guidelines were misapplied, and that the evidence was insufficient to support his arson conviction. We affirm the judgment of the district court.

I.

On January 1, 1990, a fire destroyed the Ryan Fun and Fitness Center ("the Center") in West Burlington, Iowa. The Center, recently closed due to financial difficulties, was managed by appellant Dale Ryan, and owned by Ryan's father, a successful Kansas businessman. (Ryan's father had previously backed Ryan in two failed business ventures.) Ryan assumed management of the center in January of 1989 and immediately began a major remodeling effort. The ensuing year was fraught with difficulties, financial and familial, and Ryan soon lost his enthusiasm for the Center, while his relationship with his father became increasingly strained. Ryan stated on several occasions that he wished the Center would burn down. Ryan also expressed concern on several occasions that his father did not hold him in high regard because of his failures.

On December 6, 1989, Ryan's father directed that the Center be closed. Ryan had the locks changed, retaining the only two keys in his possession. (He did not replace the key in the exterior box, to be accessed by the fire department in an emergency.) Ryan then began efforts to sell the Center. On December 15, Ryan took a complete photographic record of the Center. On December 26, he removed his personal property, and some property belonging to the Center, ostensibly in an effort to ready the Center for sale. (Ryan later made a false claim for insurance coverage on the property belonging to the Center, claiming that it was lost in the fire.) On December 20, Ryan requested that U.S. West disconnect the Center's dedicated fire alarm line, as well as the regular phone

line. Ryan believed that the lines would be disconnected immediately. In fact, the regular phone line was disconnected on December 21 and the dedicated line disconnected on December 28. Between December 20 and December 28, five trouble signals from the center (caused by interruption in the electrical current or the dedicated phone line) were received at the West Burlington law enforcement center. In each instance, the alarm was reset at the center's fire alarm panel, generally within a few minutes. On December 29, Ryan called U.S. West to verify the disconnection of the dedicated line.

On December 29, at approximately 2:00 a.m., West Burlington police officer Larry Garmoe made a routine check of the Center. In the parking lot, he noticed a car loaded with containers, including floor solvents, motor oil, and linseed oil. Officer Garmoe could not identify the labels of several additional containers located in the back seat. Ryan received a ticket in November, 1989 while driving a car with the same license number. Officer Garmoe testified that he saw Ryan driving a car with the same license number on January 10, 1990. (While the license number was never in dispute, Officer Garmoe did note on the night of December 29, that the car which he observed was a blue Ford Fairmont. In fact, the car was a white Mercury Zephyr, owned by Ryan's father.)

On December 30 and 31, Ryan was distraught and depressed, apparently over a disagreement with his girlfriend. In late December, 1989, Ryan made serious inquiries about the purchase of a bar in Gulf Port, Illinois, indicating that money was no problem. On January 2, 1990, Ryan again spoke with the owner of the bar about the purchase, but failed to mention the fire at the Center.

The fire at the Center was discovered at approximately 8:30 p.m. on January 1, 1990. Firefighters later testified that, upon their arrival at the Center, all doors were locked and there were no signs of forcible entry. Firefighters further testified that they observed unusual fire behavior during the firefighting and rescue effort, similar, in their experience, to other fires which had been fueled by flammable liquids. Two distinct and separate red hot areas, approximately 50 feet apart, glowed on the roof; low bluish-colored flames which rekindled quickly when blackened with

water danced on the floor; an intense wall of fire which did not respond to water swept across the lounge area; an isolated, interior fire confined to the sauna rekindled quickly when doused with substantial quantities of water; an unusual fire in the wall of the weight room also rekindled after being blackened with water. Firefighters Wilt and Klein were the first firefighters to enter the Center and were discovered missing ten to fifteen minutes later. Apparently having left their hoses in panic, in response to the wall of fire in the lounge, the bodies of the two men were discovered approximately three hours later in the DJ booth of the lounge area.

Ryan arrived at the fire scene shortly after the fire started. Firefighters later testified that Ryan, initially in a quiet mood, began making inquiries about the origin of the fire, and stated that he hoped they did not think it was arson. Ryan became very agitated when he learned that two firefighters were missing. Approximately four to five days later, Ryan wrote to his girlfriend, stating that he did not start any "fires" at the Center. On January 2, 1990, Ryan hired an attorney.

Investigations by the Iowa Fire Marshal's office and an electrical engineer ensued. It was revealed that Ryan had the only key at the time of the fire (the other having been lost in the snow), the circuit breaker for the fire alarm panel had been turned off, and the battery backup to the alarm had been disconnected before the fire. The fire marshal examined the debris and the number, location, and type of burn patterns, and concluded that the fire was caused by arson. The fire marshal also concluded that flammable liquids had been used and that there were at least six separate areas of fire origin. An electrical engineer also examined the fire scene and ruled out electrical cause and origin. Laboratory tests for flammable liquids, conducted on 26 samples taken from the fire scene, were negative. However, two experts testified that, depending upon the characteristics of the flammable liquids used, the amount of water applied, and the duration of the fire, flammable liquids can be diluted, can evaporate, or can be totally consumed by fire. Thus, the presence of flammable liquids is not always detectable, and the negative test results not always conclusive.

Ryan testified at trial, and called five expert witnesses in his behalf. Ryan's theory of defense was that arcing wires in a cash register, which he accidentally knocked off of the counter, caused the fire, which then spread to the other areas of the Center. Ryan contended that the multiple burn patterns were caused by pieces of flammable materials falling from the ceiling and that the fire spread through the roof. Ryan also offered evidence that the phenomena of flashover and backdraft caused the unusual fire behavior witnessed by the firefighters.

On rebuttal, the government's experts attacked Ryan's theory involving the design of the cash register. The experts also testified that Ryan's theory of the fire's spread was inconsistent with known fire behavior.

II.

A. *Due Process Violation*

Officer Larry Garmoe testified at trial about his observations in the early hours of December 29, 1989. Officer Garmoe noted the presence of a blue Ford Fairmont at the Center with numerous containers in the back seat. Officer Garmoe also testified that he saw Ryan driving the same car several days after the fire. At the time of his December 29 observations, the presence of the containers of linseed oil, floor solvents, and motor oil had no particular significance for Officer Garmoe, so his report simply notes the license plate number and make of the car. (The report was offered at trial as Exhibit AA.) Police records corroborate Officer Garmoe's testimony that he requested the dispatcher to run the license plate number with National Crime Information Center (NCIC) at the time of his report.

The West Burlington police chief testified that Ford and Mercury products are similar in appearance, and that colors are difficult to distinguish at night. There was no testimony that any of the products seen by Officer Garmoe in the car are flammable liquids or accelerants.

Exhibit AA was furnished to the defense during pretrial discovery. The content of Officer Garmoe's testimony was provided to the prosecutor only shortly before trial (approximately twenty months after the fire), and was not revealed to the defense.

Ryan moved for a mistrial, alleging a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The court reserved its ruling, requesting additional information from the prosecution and advising the defense that it could proceed with cross-examination of Officer Garmoe, and that it could recall Officer Garmoe after all of the requested information had been provided. The defense vigorously cross-examined Officer Garmoe, emphasizing the incorrect description of the car, discrepancies in the time of his observations, the fact that Ryan was not the registered owner of the car, and that Garmoe had only recently come forward with this important information. After further hearing and review of documents on two occasions, the court denied Ryan's motion for mistrial, finding that the evidence was not exculpatory, that disclosure of the evidence during trial negated any claim of suppression, and that Ryan's due process rights were not violated.

Ryan contends that the prosecution's failure to provide the substance of Officer Garmoe's testimony, particularly the information regarding a blue Ford Fairmont, to the defense pretrial, requires reversal under *Brady v. Maryland*, *supra*. *Brady* requires disclosure of all material evidence favorable to the accused, whether impeachment or exculpatory evidence, in the possession of the United States. *Brady*, and its progeny, make clear that constitutional error is committed only where the omitted evidence would create a reasonable doubt about guilt that would not otherwise have existed. A finding of materiality of the evidence is required.

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *United States v. Wayne*, 903 F.2d 1188, 1192 (8th Cir. 1990). Further, "the availability of other opportunities to elicit the same information on cross-examination is sufficient in determining whether a Defendant's constitutional rights

have been violated." *United States v. Klauer*, 856 F.2d 1147, 1149 (8th Cir.1988) (discussing the confrontation clause).

Ryan's contentions fail under all elements of the *Brady* ruling. Ryan vigorously argues that the evidence was exculpatory and not incriminating, and that its "concealment" severely prejudiced his case. (Ryan's theory of defense included the argument that the government could present no evidence whatsoever connecting Ryan to the use or possession of accelerants.) We disagree. The evidence was not exculpatory, but rather inculpatory, and the government was under no obligation to reveal it. *See United States v. Carper*, 942 F.2d 1298, 1300 n. 1 (8th Cir.), *cert. denied*, --- U.S. ----, 112 S.Ct. 614, 116 L.Ed.2d 636 (1991). To the extent that the evidence included impeachment material, the evidence was revealed early in the trial, when sufficient time and opportunity remained to effectively use the damaging information in cross-examination. *United States v. Nelson*, 970 F.2d 439 (8th Cir.1992), citing *United States v. Klauer*, 856 F.2d 1147 (8th Cir.1988). Any prejudice caused by the delay was sufficiently redressed and Ryan's due process rights were not violated.

We further agree with the district court's assessment as to materiality. Earlier disclosure of the evidence would not have affected the outcome of the trial; it was neither meaningful nor material evidence.

Ryan makes an additional allegation that Officer Garmoe's testimony was so inherently incredible as to constitute incriminating evidence that the government knew or should have known was false. This accusation of prosecutorial misconduct is fallacious and without substantiation. Officer Garmoe's testimony was certainly worthy of the vigorous cross-examination it received, particularly with regard to its timing. The determination of its credibility remains with the jury.

B. *Sixth Amendment Right to Counsel*

Ryan testified on direct examination that he retained a lawyer the day after the fire because he believed that he would be the focus of the arson investigation. Ryan argues on appeal that the prosecution's two subsequent references to that fact were

calculated, repeated efforts to infer Ryan's guilt based upon his retention of an attorney, in contravention of the Sixth Amendment.

In the absence of a contemporaneous objection at trial, this court is limited to a determination of whether the prosecution's statements constituted plain error, affecting Ryan's substantive rights. Fed. R. Crim. Pro. 52(b). *United States v. Frady*, 456 U.S. 152, 162-3, 102 S.Ct. 1584, 1591-92, 71 L.Ed.2d 816 (1982); *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). We have reviewed the record and we are not inclined to agree with Ryan's characterization of it. The prosecutor did not treat Ryan's exercise of his right to counsel as substantive evidence of Ryan's guilt. Rather, the prosecutor asked questions of Ryan in a fair response to Ryan's own testimony on direct. *See United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (discussing the right to remain silent). The prosecution's statements do not constitute plain error, and no miscarriage of justice has resulted. *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

C. *Jury Instructions*

1. *Jurisdictional Scope of 18 U.S.C. § 844(i)*

Title 18 U.S.C. § 844(i) provides:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or *in any activity affecting interstate or foreign commerce* shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any

> term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(Emphasis supplied.) The district court instructed the jury as follows:

> "Interstate commerce" means trade, or business, or travel between the states. "Used in an activity affecting interstate commerce" means to affect in some way trade, or business, or travel between the states.
>
> If you find from the evidence beyond a reasonable doubt that, on or about January 1, 1990, the Ryan Fun and Fitness Center building was owned by Ronald D. Ryan, a resident of Kansas, and leased by him to Ryan Air Services, Inc., a Kansas Corporation, then the required affect on interstate commerce has been proved; or if you find from the evidence beyond a reasonable doubt that on January 1, 1990, the Ryan Fun and Fitness Center building was supplied with natural gas used to heat the building, and such natural gas was supplied from outside of the state of Iowa, then the required affect on interstate commerce has been proved. If you do not so find, then the required affect on interstate commerce has not been proved and you must find the defendant not guilty.

Jury Instruction Number 10. Ryan claims that the instruction failed to properly instruct the jury because neither of the two factual bases stated by the judge satisfies the statutorily required nexus between the Center and interstate commerce. More specifically, Ryan contends that the scope of the required "activity" is restricted to the commercial function served by the building at the time of the fire. Ryan's arguments are cleverly drawn and stated, and his position is certainly plausible, even inviting, on its face. However, this narrow approach to section 844(i) ignores legislative history as well as precedential case law in this circuit and learned comment from other circuits, and cannot carry the day.

This court, along with others meeting the issue, has consistently construed the interstate commerce requirement of section 844(i) very broadly. Relying extensively upon the legislative history of section 844(i), the Supreme Court, in *United States v.*

Russell, 471 U.S. 858, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985), concluded that Congress intended to exercise its full power under the Commerce Clause. In *United States v. Voss*, 787 F.2d 393, 397 (8th Cir.), *cert. denied*, 479 U.S. 888, 107 S.Ct. 286, 93 L.Ed.2d 261 (1986), we stated that Congress intended "to exercise its fullest, constitutionally permissible jurisdictional reach over persons attempting to commit arson to property affecting interstate commerce." A review of the legislative history makes it apparent that Congress intended to protect *at least* all business property. *United States v. Russell, supra*; *United States v. Mayberry*, 896 F.2d 1117 (8th Cir. 1990). In *United States v. Voss*, *supra*, we searched for a de minimis connection, holding that the de minimis standard is easily, though not always, met.[2] Subsequent to *Voss*, we have applied ever broadening definitions to the statutory language, "an activity used in interstate commerce". In *United States v. Mayberry*, 896 F.2d at 1120, we required "a showing that there is indeed some interstate character to the property involved." (Logging mill was temporarily closed, but still subject to lease, and still had electricity supplied to it.) And in *United States v. Hermes*, 847 F.2d 493, 496-97 (8th Cir.1988) (burned saloon, not in use, but held out by owner as available for commercial purposes), we stated that the reference in section 844(i) "has been held to require *merely that the property has some relationship to an activity of commercial nature.*" (Emphasis supplied.) (Citing *United States v. Andrini*, 685 F.2d 1094 (9th Cir.1982); *United States v. Patterson*, 792 F.2d 531 (5th Cir.), *cert. denied*, 479 U.S. 865, 107 S.Ct. 220, 93 L.Ed.2d 149 (1986).)

Under the preceding definitions, both of the bases used by the district court to establish the interstate commerce nexus are valid. Indeed, the receipt and use of natural gas from across state borders is an activity directly affecting interstate commerce. *See United States v. Mayberry*, 896 F.2d at 1119; *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70

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[2] The showing in *Voss*, that a corporate property owner purchased insurance from an in-state carrier, doing business in more than one state, was held to be an inadequate nexus, as a matter of law.

L.Ed.2d 152 (1981).[3] In this decision, we join the Seventh Circuit in its holding in *United States v. Zabic*, 745 F.2d 464, 470-71, n. 4 (7th Cir.1984). However, we refuse to extend the decision, as did the Seventh Circuit, to property which is purely private in nature, such as a privately owned home, used solely for residential purposes. *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.1990).

Likewise, ownership of the Center by Ron Ryan, who leased the center to Ryan Air Services, a Kansas corporation solely owned by Ron Ryan, is an activity affecting interstate commerce. Ryan relies upon our decision in *Voss*, *supra*, and highlights the second circuit opinion in *United States v. Mennuti*, 639 F.2d 107 (2d Cir.1981), in his argument that passive ownership is insufficient. However, the relationship in this instance demonstrates anything but passive ownership. The evidence unequivocally showed that the ownership was interstate in nature, and that Ryan's father exercised direct, forceful control and decision making authority over the business and the disposition of the building itself. The important federal/state balance which the de minimis standard guards is maintained with this decision. *See United States v. Voss*, 787 F.2d at 397.[4]

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[3] While we declined to embrace this sweeping view in *United States v. Hansen*, 755 F.2d 629, 631, n.4 (8th Cir.), *cert. denied*, 474 U.S. 834, 106 S. Ct. 105, 88 L.Ed.2d 85 (1985) (discussing the merits of basing jurisdiction on the use of electricity; holding based upon interstate nature of transient tenants in building), the Supreme Court has made it clear that the determination that an activity affects interstate commerce need not depend upon any actual interstate movement. It suffices that the activity is "an element of a much broader commercial market". *Russell v. United States*, 471 U.S. at 862, 105 S. Ct. at 2457. *See also*, *United States v. Voss*, 787 F.2d at 398, n.2; *United States v. Hermes*, 847 F.2d at 496, n.2.

[4] We are convinced that the record reflects additional, alternative acts upon which a showing that the Center was used in activity affecting interstate commerce could be grounded. Most notably, Ryan had, under explicit instructions from his father, begun the process of marketing the Center for resale. An appraisal had been conducted, and real estate agents communicated with, and the intent to sell the building was stated. The Center had been recently closed, however, the building was obviously

2. *Sentencing Enhancement Provisions of 18 U.S.C. § 844(i)*

According to Ryan, 18 U.S.C. § 844(i) creates three distinct offenses, with graded punishments depending upon the seriousness of the resulting harm.[5] Using this argument as a springboard, Ryan spins off a variety of wrongs committed by the district court in submitting this case to the jury. The government takes the position that the penalties enunciated in section 844(i) comprise sentence enhancement provisions, rather than three separate statutory offenses. Under this interpretation, all of the essential elements of the crime were submitted to the jury, and Ryan was properly convicted.

The courts of appeals have not yet construed this aspect of section 844(i). However, consideration of the issue under other, somewhat similar statutes does lend some guidance. *See generally United States v. Rush*, 840 F.2d 574 (8th Cir.) *(en banc), cert. denied*, 487 U.S. 1238, 108 S.Ct. 2908, 101 L.Ed.2d 940 (1988), and *United States v. Davis*, 801 F.2d 754 (5th Cir.1986) (both construing 18 U.S.C.App. § 1202(a), a portion of the Armed Career Criminal Act of 1984, and reaching differing conclusions). In determining statutory intent, we must first try to divine the intent of Congress from the plain language and structure of the statute. *Garrett v. United States*, 471 U.S. 773, 779-82, 105 S.Ct. 2407, 2412-13, 85 L.Ed.2d 764, *rehg. denied*, 473 U.S. 927, 106 S.Ct. 20, 87 L.Ed.2d 698 (1985) (considering the double jeopardy implications of a prosecution for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848). Unfortunately, the plain language does not reveal the solution to our dilemma. In some respects, section 844(i) does resemble a sentence enhancement provision. The first portion of the lengthy sentence defines the

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intended to be, and was, for all practical purposes, available for commercial use. *See United States v. Hermes*, 847 F.2d at 496, and cases cited therein. However, this additional undisputed evidence of alternative jurisdictional predicates cannot be considered upon review by the appellate court. *United States v. Voss*, 787 F.2d at 397-98.

[5] See Section C, 1, above, for statutory language.

crime of arson, while the second and third portions seem to do no more than single out a subset of arsonists for more severe punishment. In addition, the use of semicolons, the conjunctive "and", and the lack of clear division into separate sections suggests treatment of the contents as a single offense. *See United States v. Rush*, 840 F.2d at 577; *United States v. Hawkins*, 811 F.2d 210, 218-19 (3d Cir.1987). Most importantly, a discrete offense is not indicated. Section 844(i) clearly predicates punishment upon conviction of the underlying crime; the latter sections of the statute could not stand alone, independent of the arson offense. *See United States v. Rush*, 840 F.2d at 577; *United States v. Davis*, 801 F.2d at 756.

On the other hand, section 844(i) is not free from ambiguity in that it lacks some of the common indicia of sentencing enhancement provisions. There is no explicit reference to conviction of the underlying offense, and while the penalty for resulting personal injury is a simple multiplier of the arson penalty ($10,000 to $20,000 and ten years to twenty years imprisonment), the penalty proscribed for resulting death is potentially infinitely more severe, and is left to the discretion of the jury (in the case of life imprisonment or death) or to the judge. Further, neither a procedure for sentence hearing, nor a title identifying the sentencing enhancement provisions appears in the statutory language. *See United States v. Davis*, 801 F.2d at 755-56.

While it is our conclusion that the above considerations militate in favor of interpreting section 844(i) as a sentencing enhancement provision, the plain language is not conclusive. For this reason, and because the import of any statute allowing the death penalty must be cautiously divined, we turn for guidance to the legislative history of section 844(i). We have extensively reviewed the Congressional Record regarding the provisions of the Organized Crime Control Act of 1970 (now referred to as the Comprehensive Crime Control Act), and its 1982 and 1984 amendments. Developed at a time of great civil unrest[6], this

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[6] Bombings during a sixteen month period in 1969-1970 numbered in excess of 4,500, and included numerous federal buildings, with federal officers and employees as the targets. 116 Cong.Rec. 35298 (1970).

federal legislation was originally designed to govern only "explosive(s)" (Pub. L. 91-452). In 1982 the word "fire" was added (Pub.L. 97-298) to ensure that the section could be used in all federal arson cases, especially those arsons caused by gasoline. *See* 1982 U.S. Code Cong. & Admin. News, p. 2631. The 1970 legislation was seen by Congress as a "tough" measure, "needed *** to deal effectively with the conspiratorial groups who are so insane as to use explosives and incendiary devices." 116 Cong.Rec. 35298 (1970). The language now in question was part of the original legislation and, indeed, remains virtually unchanged since its passage in 1970.[7] The 1970 Congressional Record indicates that section 844 had, at its inception, two distinct facets. The first portion was to provide a regulatory framework for manufacturers, dealers, and users of explosives. The second facet made "bombings" a federal offense subject to stringent sanctions, including the death penalty. The Congressional Record reveals that the latter portion of section 844 was consistently referred to as a "proposal to punish," and is discussed solely in terms of "strict and substantial penalties" and "sanctions" to be imposed. 116 Cong. Rec. 35299 (1970).

The 1984 legislative history evidences the same concern with sentencing enhancement. Senate Report No. 98-225 at 4, U.S. Code Cong. & Admin. News 1984, p. 3182, sets out the text of the report of the Senate Committee on the Judiciary. Senator Thurmond's report, recommending proposed comprehensive reforms and improvements in the federal criminal laws, is most enlightening. The report on the section now codified as 18 U.S.C. § 844(i), refers throughout to "enhanced penalty provisions" and "enhanced punishments."

> All of these subsections contain enhanced penalty provisions that apply if personal injury or death results that represent a substantial increase over the ten years of

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[7] In 1984, Pub.L. 98-473 substituted more specific, explanatory language for the phrases "personal injury results" and "death results" in response to a federal district court decision holding that the provisions did not apply to firefighters. *See* 1984 U.S. Code Cong. & Admin. News, p. 3507.

> imprisonment and $10,000 fine authorized as the maximum punishment for their violation if no injury or death results. On their face, these enhanced penalty provisions would appear to apply to the death or injury of a fireman or police officer who responded to an arson or other offense committed in violation of subsection (d), (f), or (i). However, a Federal district court has recently held that the enhanced penalty provisions did not apply to injuries to or deaths of firefighters that occurred while fighting an arson fire set in violation of subsection 844(i).
>
> Part N is designed to clarify congressional intent in this regard to ensure that the enhanced punishment provisions of subsections (d), (f), and (i) apply if personal injury or death results to any person including a fireman, policeman or other public safety officer, because of a violation.
>
> ***
>
> As discussed, the purpose of these amendments is to make clear the congressional intent that any person who violates one of the subsections in a manner that results in a public safety officer's injury or death is subject to the enhanced punishments provided in the subsections.

1984 U.S. Code Cong. & Admin. News, pp. 3507-08 (footnotes omitted). This language is free from ambiguity. Our examination of the origins of the law and the intentions of its drafters leads inescapably to the conclusion that Congress's concern was with the stringent and severe treatment of those who violate the explosives/arson law. Congress meant to deal with arsonists severely, not to overlay a myriad of elements of proof onto the plain statutory requirements, as Ryan suggests. We hold that 18 U.S.C. § 844(i) is a sentencing enhancement provision, not a separate and distinct offense with distinct, heightened elements of proof.

3. *Foreseeability and Public Safety Officers*

The remainder of Ryan's claims of error in the jury instructions are largely resolved by the finding above, that the latter portions of section 844(i) are sentencing enhancement provisions.

The findings necessary to impose the enhanced penalty were within the province of the judge, not the jury. Suffice it to say that, contrary to Ryan's protestations, he was not convicted absent jury findings on all critical elements of the crime. The jury, via special verdict interrogatories, made extensive findings. We do however, comment briefly upon several of Ryan's arguments in the interest of resolving any recurring questions.

First, Ryan argues that the statutory language, "as a direct or proximate result of conduct prohibited by this subsection ***" engrafts upon the statute the common law standard of negligence. In other words, Ryan would require a specific finding that the deaths of the two firefighters were foreseeable to Ryan when he set the fire. Further, Ryan alleges that, in this case, only cause in fact was considered in the determination of the relationship between his conduct and the two deaths. We hold that the use of the term "proximate cause" in this criminal statute does not require a distinct finding of foreseeability.

To be sure, the report of the Senate Committee on the Judiciary addresses proximate cause and sets forth an array of examples where the consequences of an act of arson are "reasonably foreseeable," including, "a response by firemen and others." U.S. Code Cong. & Admin. News 1984, p. 3508. This comment, however, does not so dramatically alter the elements of the crime as Ryan suggests. Proximate cause is commonly defined as:

> That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred***. An injury or damage is proximately cause by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Black's Law Dictionary (6th ed. 1990). The court in this instance submitted the following instruction to the jury:

> The deaths of William Klein and Joseph Wilt resulted from defendant's conduct of setting the fire if his conduct was a proximate cause of their deaths. Defendant's conduct was a "proximate cause" of their deaths if it was a substantial factor in causing them to die on January 1, 1990, and they would not have died then except for defendant's conduct.
>
> "Substantial" means that defendant's conduct has such an effect in producing the deaths as to lead a reasonable person to regard his conduct as a cause of the deaths.
>
> An event, such as the deaths of William Klein and Joseph Wilt, may have more than one proximate cause. The government need not prove that defendant's conduct was the only proximate cause of their deaths; it needs to prove only that defendant's conduct was a proximate cause of their deaths.

Jury Instruction Number 13.

We find the legal principle of proximate cause embodied in section 844(i) to have been adequately presented to the jury. When Congress provided that death proximately resulting from arson could be punishable by death or life imprisonment, we must consider it to have been fully cognizable of the principles of legal causation. *Cf. United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976). There is no intent by Congress on the face of the statute to engraft the elements of common law negligence onto the arson statute, thus frustrating the purpose of the statute with artificial restrictions.

Ryan *admits* that one could conclude from the evidence that his conduct proximately caused the deceased men to engage in their duties as firefighters, but argues that the deaths were not reasonably foreseeable because the men left their water hoses while inside the building.[8] (The government's evidence suggests that an intense wall of fire which did not respond to water, sweeping across the interior of the building where the men were located, caused the

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[8] Appellant's brief at 32.

men to panic.) Ryan's suggestion is patently absurd and even insulting. The variation in this instance in the result intended by Ryan, and the result actually achieved by Ryan, in setting the fire is not so tenuous that is would be unfair to hold him criminally responsible for the actual result — death.

Second, Ryan quibbles with the court's use of the words "voluntary firefighters" instead of the statutory language, "public safety officers". A legal question for the judge, we find no error in the court's decision that the statutory term includes voluntary firefighters. The legislative history supports this conclusion. It is clear that the 1984 amendments were intended to apply to firefighters. U.S. Code Cong. & Admin. News 1984, pp. 3507-8. In addition, "public safety officers" is defined at 42 U.S.C. § 3796b(7) to include firefighters, with or without compensation. Furthermore, section 844 refers to the death of "*any* person, including public safety officers" (emphasis supplied). For purposes of conviction, Ryan's argument is of no import whatsoever.

4. *Use of Special Interrogatories*

The district court, faced with the parties' arguments regarding the issue of statutory construction, did not make a specific finding on the issue. Rather, the court wisely and skillfully structured the jury instructions, verdict form, and special interrogatories[9] in such a fashion that, regardless of our ultimate holding on the issue, we would have the benefit of all of the jury's findings. The jury considered and made findings as to each and every element of section 844(i), using the standard "beyond a reasonable doubt."

Ryan's assertion that the use of special interrogatories is generally forbidden, and that these particular interrogatories crafted by the district court avoided a verdict by the jury on the issue of homicide, is completely misplaced. The courts have indeed been critical of special interrogatories in criminal cases. *United States v. Desmond*, 670 F.2d 414 (3d Cir.1982); *United States v. Spock*, 416 F.2d 165 (1st Cir.1969); *Gray v. United States*, 174 F.2d 919 (8th Cir.), *cert. denied*, 338 U.S. 848, 70 S.Ct. 90, 94 L.Ed. 519

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[9] See Appendix A for verdict form and special interrogatories.

(1949). The overriding concern, eloquently addressed in several of these cases, is one of judicial control.

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions.

United States v. Spock, 416 F.2d at 182. However, special interrogatories may be appropriately and effectively used in particular situations without abridging the concerns expressed over their use generally. *See, e.g., United States v. Owens*, 904 F.2d 411 (8th Cir.1990); *United States v. Aguilar*, 883 F.2d 662 (9th Cir.1989), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 751, 112 L.Ed.2d 771 (1991).[10]

Here, the questions posed by the judge in the interest of clarity, completeness, and avoidance of the retrial of a lengthy case, evidence no elements of control or restriction by the court. The judge did not infringe upon the jury's power to freely deliberate, did not require the jury to justify its actions, and did not ask "why" the jury arrived at its decision. Nor did the court challenge the jury's power to ignore the court's instructions if it so desired, require the jury to set aside its most valuable asset as fact finder (collective common sense), or direct the jury, intentionally or unintentionally, to follow a course initiated by the court. We recognize that the use of special verdict forms, closely crafted and carefully scrutinized, may be appropriate for some limited purposes. This case, in which the criminal statute was as yet undefined, is just such an instance.

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[10] *See also Kawakita v. United States*, 343 U.S. 717, 72 S. Ct. 950, 96 L.Ed. 1249 (1952); *United States v. Smith*, 938 F.2d 69 (7th Cir.), *cert. denied*, — U.S. ---, 112 S. Ct. 254, 116 L.Ed.2d 208 (1991); *United States v. Pforzheimer*, 826 F.2d 200 (2d Cir.1983).

The remainder of Ryan's argument on this subject elevates form over substance. The fact that the jury did not make its finding on a form entitled "General Verdict" makes the findings no less clear. The jury inescapably found beyond a reasonable doubt that Ryan maliciously destroyed a building by fire, and that the deaths of the two voluntary firefighters resulted. The form of the verdict and the jury instructions, taken as a whole, were more than adequate and do not abridge Ryan's rights to a fair trial or to due process.

D. *Federal Arson Statute*

Throughout Ryan's arguments and dressed in several different guises is the assertion that Ryan was unjustly convicted of murder. Contrary to Ryan's arguments, 18 U.S.C. § 844(i) is not the functional equivalent of murder in the first degree. The court and the jury made the exact determinations required by the statute, no more and no less. Section 844(i) is an arson statute, with severe repercussions for the arsonist whose actions result in the death of another individual. Congress intended that such reckless behavior result in harsh punishment. Congress's intentions may not be subjugated to the finesse of legal arguments, attempting to overlay the requirements of murder on the federal arson statute.

E. *Sentencing*

1. *Application of the Most Analogous Guideline*

The court's starting point in computing Ryan's sentence under the United States Sentencing Commission, *Guidelines Manual* (U.S.S.G.) was § 2K1.4(c)(1), which states:

> If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Finding that Ryan's conduct was reckless and wanton, and grossly deviated from a reasonable standard of care, the court then determined that the most analogous guideline is U.S.S.G. § 2A1.1, First Degree Murder, with a base offense level of 43. However, in a further finding that Ryan did not cause the two deaths

intentionally or knowingly, the court departed downward to a base offense level of 38. (The base offense level for second degree murder is 33. The court chose an offense level at the mid-point between the two murder offenses.) Adding a two point enhancement for the obstruction of justice, the court assigned Ryan a base offense level of 40, and sentenced him to 328 months of imprisonment. (The sentencing range at this offense level is 292 months to 365 months.)

The district court's findings and conclusions are fully supported by the facts and the law. Recognizing that "the crux of the issue is really whether there was malice aforethought," S.Tr. 38, the court articulated thoughtful and complete findings supporting its decision.[11]

> And I might point out, we are not dealing with a building that was set afire willfully that was located out in the middle of a remote rural area with no people living around it. Certainly somebody torching such a building in such a location is confronted with a different situation. He has every reason to believe that probably the building would be burned to ashes before anybody would even know it.
>
> Here we are dealing with a fairly large commercial structure located in an urban area, in an urban area where it was obviously going to be discovered quickly by somebody driving by, as it was, long before it was totally destroyed, and that a fire department would be responding to the fire. We are also dealing with a situation, as Miss Reade described, where the fire was well-fueled and started, according to the testimony of Government

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[11] In the Eighth Circuit, malice aforethought may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that the fact finder is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm. *United States v. Johnson*, 879 F.2d 331, 334 (8th Cir.1989); *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir.1978).

> witnesses who persuaded the jurors, in different places in the building.
>
> Under all of the facts in evidence, I do find by a preponderance of the evidence and conclude that the conduct of the defendant was reckless and wanton; it was conduct that grossly deviated from a reasonable standard of care, and it certainly was of such a nature as to warrant the inference that I make that the defendant was aware of serious risk of death or serious bodily harm resulting. And according to that, I conclude that the most analogous offense under chapter 2, part A is first-degree murder with a base offense level of 43.

S.Tr. 40-41.

The act of arson is, by its very nature, an act of violence, an inherently dangerous act which involves the real risk of injury or death. It does not require any stretch of the imagination to recognize that, in the course of fighting a fire, death may result. Congress recognized arson as an inherently dangerous and shocking felony when it included it as a felony murder in the definition of first degree murder. 18 U.S.C. § 1111(a). Likewise, the Sentencing Commission recognized the need for appropriately severe sanctions by directing the court to determine the most analogous crime, and by instructing that guideline § 2A1.1 "also applies when death results from the commission of certain felonies." U.S.S.G. § 2A1.1, comment. (n.1).

In departing downward from level 43 to level 38, the district court again followed the guidance of the Sentencing Commission. Finding that Ryan did not cause the deaths intentionally or knowingly, the court considered Ryan's state of mind, the degree of risk inherent in the conduct, and the nature of the underlying offense conduct in making its determination. U.S.S.G. § 2A1.1, comment. (n.1).[12]

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[12] Note that the Commission does not envision any departure *below* that specified for second degree murder. U.S.S.G. § 2A1.1, comment. (n. 1).

Yet again Ryan argues that the court convicted him of criminal homicide without proving the elements of criminal homicide. However, what Ryan refers to as a "shocking misapplication" of the sentencing guidelines, is simply the court's straightforward and correct application of the law as it is set forth. While Ryan argues that there is no homicide offense analogous to Ryan's offense and thus, no higher offense level whatsoever may be assigned, we agree with the determination of the district court that the offenses of first and second degree murder are comparable, though certainly not identical. The judge carefully and conservatively chose an offense level at midpoint between the two, recognizing that "malice aforethought" is an element of both of the offenses. What statement could the judge have made which would have more clearly supported his actions? Ryan's protestations to the contrary, the facts do support the judge's findings.

2. Obstruction of Justice

Ryan also challenges his two level sentencing enhancement for obstruction of justice under U.S.S.G. § 3C1.1. Ryan argues that the court must make particularized findings that he perjured himself in testifying that he was innocent. In addition, Ryan urges that the inquiry is unconstitutional in that it places an intolerable burden on his right to testify.

This court has held that, while the enhancement may not be based solely upon Ryan's failure to convince the jury of his innocence, it may be "based on the experienced trial judge's express finding, based on the judge's personal observations, that [the defendant] lied to the jury." *United States v. Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir.1991). Thus, the analysis does not call for the specific findings and particular intonations urged by Ryan, but does call for an independent evaluation and determination by the court that Ryan's testimony was false. *See United States v. Willis*, 940 F.2d 1136 (8th Cir.1991).

In this instance, the government urged the enhancement based upon two excerpts of trial testimony wherein Ryan denied setting fires and denied using accelerants at the center. The court noted

that perjury is specifically contemplated as an obstruction of justice under the sentencing guidelines,[13] and further stated:

> In this case, the jury did find the defendant willfully started the fire. The defendant very clearly denied that he started the fire. I have no quarrel with the jury verdict. *** Under the totality of the facts and the testimony here, I find that the defendant, in fact, did commit perjury during the trial, and he will be subjected to a two-point increase in the offense level under guideline 3C1.1.

S.Tr. 21-22.

The question of Ryan's perjury lies within the sound discretion of the district court. We give due regard to that court's observations and judgments of credibility in determining whether Ryan perjured himself at trial. *United States v. Benson*, 961 F.2d 707 (8th Cir.1992). There is no question that the enhancement in this case was based upon the court's independent and express finding that Ryan lied to the jury.

The constitutional issues raised by Ryan have been previously addressed by this court. *United States v. Ogbeifun*, 949 F.2d 1013 (8th Cir.1991). Ryan's arguments add no new dimension to the issue and need not be considered further.

F. *Insufficiency of the Evidence*

Ryan's final argument is that the evidence presented by the government was insufficient to establish his guilt. In considering Ryan's motion for judgment of acquittal, the court viewed the evidence in the light most favorable to the government and upheld the conviction. We have frequently reiterated the standard by which the evidence is to be judged. To wit, the conviction should be upheld if a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Haren*, 952 F.2d 190, 194 (8th Cir.1991) ("(where) there is substantial evidence justifying an inference of guilt as found irrespective of any countervailing testimony that may be introduced." *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir.1987)).

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[13] U.S.S.G. § 3C1.1, comment. (3(b)).

We are in agreement with the district court. The substantial, albeit largely circumstantial, evidence in this case is not in any instance insufficient. We refuse to invade the province of the jury and of the court in their well-considered and supported decisions.

III.

For the reasons stated above, the judgment of the district court is affirmed.

RICHARD S. ARNOLD, Chief Judge, concurring in part and dissenting in part.

I concur in Parts II.A, B, C.3, C.4, D, and E of the Court's opinion. I also concur in the result reached in part C.2, but dissent with respect to its holding that the increased sentencing provisions of 18 U.S.C. § 844(i) define a sentencing factor and not an element of the offense. I respectfully dissent from the Court's holding in part C.1 that the interstate-commerce requirement of § 844(i) is satisfied by the mere showing that the building either was supplied with natural gas or was owned by an out-of-state resident. The statute's language, Supreme Court precedent, and precedent of this Court make clear that the structure in question must either be used in interstate commerce or in an activity affecting interstate commerce. Since there was no showing that the defunct Ryan Fun and Fitness Center was engaged in an activity affecting interstate commerce at the time it was burned, I dissent.

I.

Today the Court concludes that the portion of 18 U.S.C. § 844(i) that begins, "and if death results to any person ***," is a sentencing factor and not an element of the offense. I cannot agree with this conclusion.

The first step in determining the import of a statute is to look at the language of the statute itself. *United States v. Rush*, 840 F.2d 574 (8th Cir.) (en banc), *cert. denied*, 487 U.S. 1238, 108 S.Ct. 2908, 101 L.Ed.2d 940 (1988). The statute reads in pertinent part as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both ***; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any terms of years, or to the death penalty or to life imprisonment***.

As the Court has recognized, Section 844(i) is far from clear. It lacks the traditional indicia of a sentence enhancement; as the Court notes, the increase in punishment upon a finding that a death has occurred is infinitely more severe, and that increase is not a multiple or a derivative of the original sentence (either of which might indicate Congress intended a sentence enhancement). The Court nonetheless concludes, in the face of the ambiguity in the statute, that its language "militates" in favor of interpreting the "if death results" provision to be a sentencing factor. This conclusion is inconsistent with the settled rule that ambiguities in criminal statutes are to be resolved in favor of the defendant, under the Rule of Lenity. *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

The Court attempts to support its conclusion that the "if death results" provision is a sentencing factor by pointing to legislative history. This reliance is misplaced. The Court refers to the remarks of a single Congressman, Representative Schadeberg of Wisconsin, as showing that Section 844(i) was "consistently" referred to as a "proposal to punish." In context, the Congressman, who was neither the committee chairman nor the ranking minority member, was merely attempting to convince his colleagues that Section 844(a)-(i) was an important part of the Organized Crime Act as a whole. All discussion of penalty found in the legislative record was designed only to convince fellow members that federalization of certain classes of bombings was necessary to bring the perpetrators to justice. 116 Cong.Rec. 35298-99 (1970). The Court's reference to Senator Thurmond's

1984 Report for the Senate Judiciary Committee is similarly unavailing. Once again, the Court has chosen a single sentence out of context to demonstrate that the "if death results" provision is a punishment provision; the Senate Report was discussing punishment in the context of including firefighters and police within the definition of "any person." In neither case does the legislative history address whether the "if death results" language was intended to be an element of the offense or just a sentencing factor. Finally, the legislative history is not as clear as the Court suggests. The House Judiciary Committee Report on the proposal that became the Organized Crime Act states in its reference to Section 844(i): "Existing penalties are increased and the death penalty is extended to *new offenses* added by the title." H.R.Rep. No. 91-1549, 91st Cong., 2d. Sess. 5 (1970), 1970 U.S. Code Cong. & Admin. News 4011 (emphasis added).

Ultimately, the legislative history is far from clear, and, as Chief Justice Rehnquist stated in *Regan v. Wald*, 468 U.S. 222, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984), the statements of individual Congressmen, "unless very precisely directed to the intended meaning of particular words in a statute," cannot take precedence over the statute's own language. *Id.*, at 237, 104 S.Ct. at 3055.a

Since Section 844(i) is ambiguous as to whether the "if death results" provision is a sentencing factor or an element of the offense, and since the legislative history does not directly speak to and clarify this question, the Rule of Lenity requires this Court to interpret the statute in favor of the defendant. Therefore, the "if death results provision" defines an element of the offense. I nonetheless concur in the Court's rejection of defendant's arguments based on the failure to charge the jury that it must find that death resulted as an element of the offense, because any error on that count was cured by the District Court's submission of the question to the jury on special interrogatories. The jury found beyond a reasonable doubt that the deaths of Firefighters Wilt and Klein resulted as a consequence of the arson; therefore, the jury in fact passed on all the elements of the crime.

II.

The Court today holds that the mere receipt of natural gas or out-of- state ownership of property is an activity sufficient upon which to base jurisdiction under 18 U.S.C. § 844(i). The Court grounds its holding on language from *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985), and *United States v. Voss*, 787 F.2d 393 (8th Cir.), *cert. denied*, 479 U.S. 888, 107 S.Ct. 286, 93 L.Ed.2d 261 (1986). The Court correctly states that these cases stand for the proposition that Section 844(i) is to be read broadly, and that Congress intended to exercise its full Commerce Clause power to protect commercial property. *Russell*, 471 U.S. at 860, 105 S.Ct. at 2456; *Voss*, 393 F.2d at 397. However, the Court bends this precedent out of shape to conclude that mere receipt of natural gas or out-of-state ownership, without any additional showing as to the use of the structure itself, satisfies the activity requirement of Section 844(i).

In *Russell*, the Supreme Court did say that the legislative history of Section 844(i) "suggests" that Congress intended to protect at least all business property, as this Court states; nonetheless, the Supreme Court also pointed out that "[b]y its terms, however, the statute only applies to property that is *'used' in an 'activity' that affects interstate commerce.*" *Russell*, 471 U.S. at 862, 105 S.Ct. at 2457 (emphasis added); see also *Voss*, 787 F.2d at 397 (the use of the building itself must have a *de minimis* connection to interstate commerce). In other words, there must be a showing that there is "some interstate character to the property involved." *United States v. Mayberry*, 896 F.2d 1117 (8th Cir.1990).

Ryan Fun and Fitness Center was no longer a going concern at the time it was burned. Had the business been in operation, then its use of natural gas or the fact of out-of-state ownership might be relevant to the inquiry of whether its use affected interstate commerce. Nonetheless, an inquiry into its use would still be necessary for Section 844(i) to apply. The Court relies on several cases involving businesses that had either been temporarily closed or were no longer in use to justify its holding; however, in each of these cases the business was still operational. *United States v. Mayberry*, 896 F.2d at 1120 (logging mill temporarily closed due

to lumber shortage but ready to operate once lumber was received); *United States v. Hansen*, 755 F.2d 629 (8th Cir.), *cert. denied*, 474 U.S. 834, 106 S.Ct. 105, 88 L.Ed.2d 85 (1985) (apartment building held to be used in interstate commerce);[1] *United States v. Hermes*, 847 F.2d 493 (8th Cir.1988), (saloon was no longer in use but was held out by its owner as available for lease for commercial purposes).[2] When the Ryan Fun and Fitness Center closed, it closed permanently and was no longer available for commercial use. Ryan had not placed the building up for sale, nor was he attempting to lease it to anyone out of state. Therefore, the building's receipt of natural gas, without more, is insufficient to establish the necessary use in an activity that affects interstate commerce. Similarly, out-of-state ownership alone does not establish that the building's use at the time it was burned had an effect on interstate commerce. The proper inquiry is into the function of the building itself, and then a determination of whether that function affects interstate commerce.

Further, the Court's holding disturbs the balance between the state and federal governments by allowing federal prosecutors to bring almost any arson prosecution — traditionally a state crime — without a clear expression of Congress's intent to do so. Arson is a traditional common-law state crime; therefore, any federalization of arson laws must be clearly stated. *United States v. Bass*, 404

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[1] In *Russell*, the Supreme Court stated that the rental of an apartment building satisfied the requirement of Section 844(i) that the building be used in an activity affecting interstate commerce. 471 U.S. at 862, 105 S.Ct. at 2457.

[2] The Court's reliance on the Seventh Circuit decision in *United States v. Zabic*, 745 F.2d 464 (1984), is also misplaced. That case, decided before *Russell*, held that the receipt of natural gas by a 43-unit apartment building "used exclusively for commercial purposes" provided the necessary effect on interstate commerce. But once again, the primary inquiry into the building's *use* had already been made, and it was determined that the building was currently in use as a commercial enterprise. It was that use that then affected interstate commerce. This Court today omits the necessary initial inquiry into whether the building was used in a way that affects interstate commerce.

U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1981) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes) Taken to its logical conclusion, the Court's holding would allow the federal courts to reach almost all arson cases, regardless of whether the structure in question was business or residential. The Court's refusal to acknowledge this fact demonstrates the fundamental flaw in its reasoning. Without an inquiry into the use of the structure, arson committed against any building, even a private home, would be a federal crime, as the Seventh Circuit recognized in *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.), *cert. denied*, 498 U.S. 838, 111 S.Ct. 111, 112 L.Ed.2d 81 (1990). Congress may have the power under the Commerce Clause to reach arson committed against a private home; however, it has not chosen to exercise that power.[3] I therefore respectfully dissent, and would remand this case for a new trial with proper instructions on the issue of interstate commerce.

APPENDIX

COUNT 1

Form No. 1

We, the jury, find the defendant, Dale Lynn Ryan, guilty of malicious destruction of a building by fire as charged in Count 1 of the indictment.

(s) Thomas R. Johnston

FOREPERSON

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[3] This conclusion is in accord with other circuits that have addressed the issue. See *United States v. Mennuti*, 639 F.2d 107 (2d Cir.1981) (because Congress did not exercise its commerce power to include private residences, it is limited by the language of Section 844(i)); *United States v. Monholland*, 607 F.2d 1311, 1316 (10th Cir.1979) (there is no indication in the statute that Congress, although it intended to have the statute broadly construed, intended everybody and everything to be included).

Form No. 2

We, the jury, find the defendant, Dale Lynn Ryan, not guilty of malicious destruction of a building by fire as charged in Count 1 of the indictment.

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FOREPERSON

QUESTIONS

(To be answered only if you have found the defendant guilty.)

(1) Do you find that the government has proved beyond a reasonable doubt that defendant's conduct of setting the fire resulted in the death of William Klein?

Yes X No __

(2) Do you find that the government has proved beyond a reasonable doubt that defendant's conduct of setting the fire resulted in the death of Joseph Wilt?

Yes X No __

(3) Do you find that the government has proved beyond a reasonable doubt that at the time of his death, William Klein was a volunteer firefighter in the West Burlington Volunteer Fire Department?

Yes X No __

(4) Do you find that the government has proved beyond a reasonable doubt that at the time of his death, William Klein was performing his duties as a volunteer firefighter as a direct or proximate result of defendant's conduct of setting the fire?

Yes X No __

(5) Do you find that the government has proved beyond a reasonable doubt that at the time of his death, Joseph Wilt was a volunteer firefighter in the West Burlington Volunteer Fire Department?

Yes X No __

(6) Do you find that the government has proved beyond a reasonable doubt that at the time of his death, Joseph Wilt was performing his duties as a volunteer firefighter as a direct or proximate result of defendant's conduct of setting the fire?

Yes X No ___

(s) Thomas R. Johnston

FOREPERSON